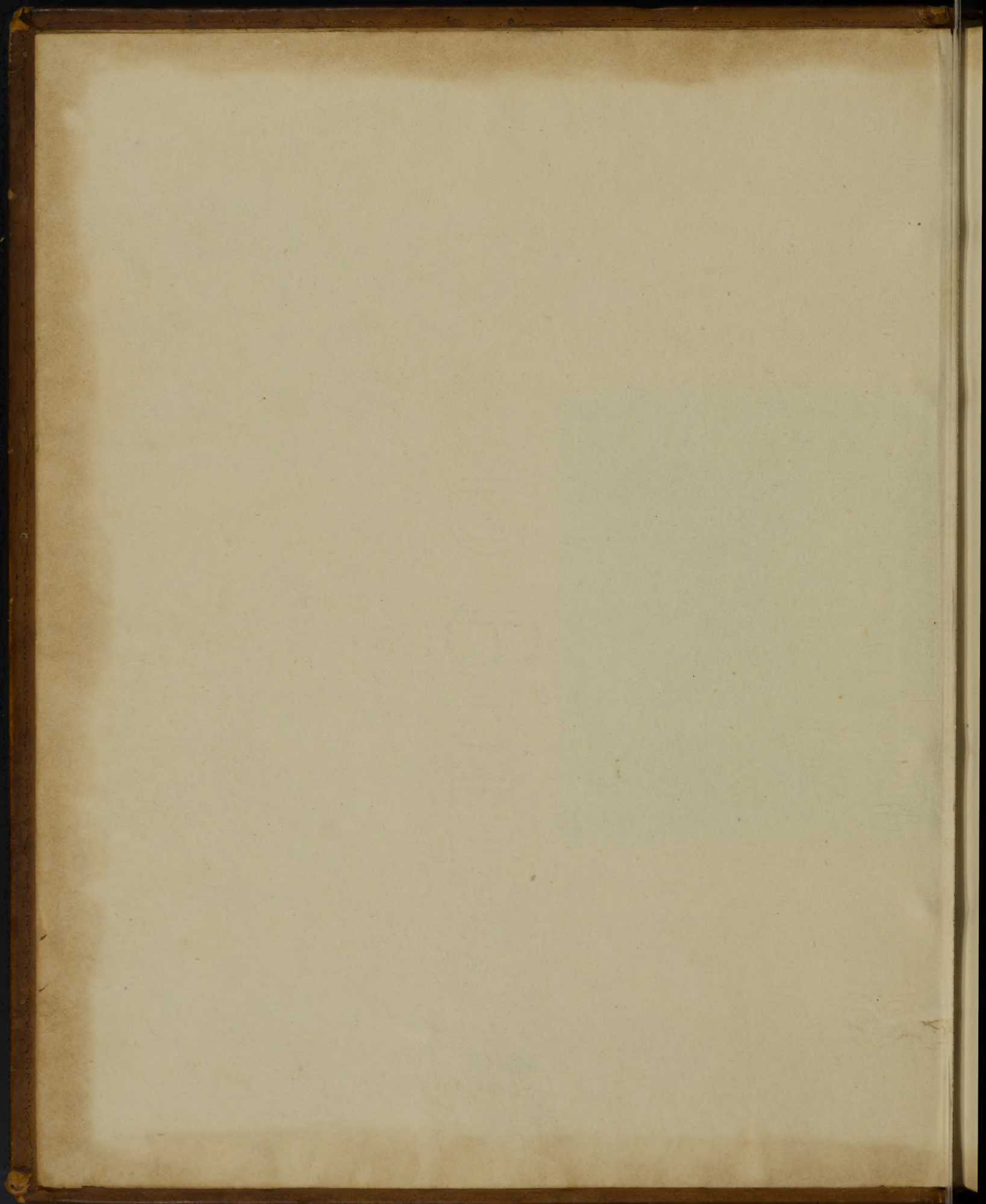
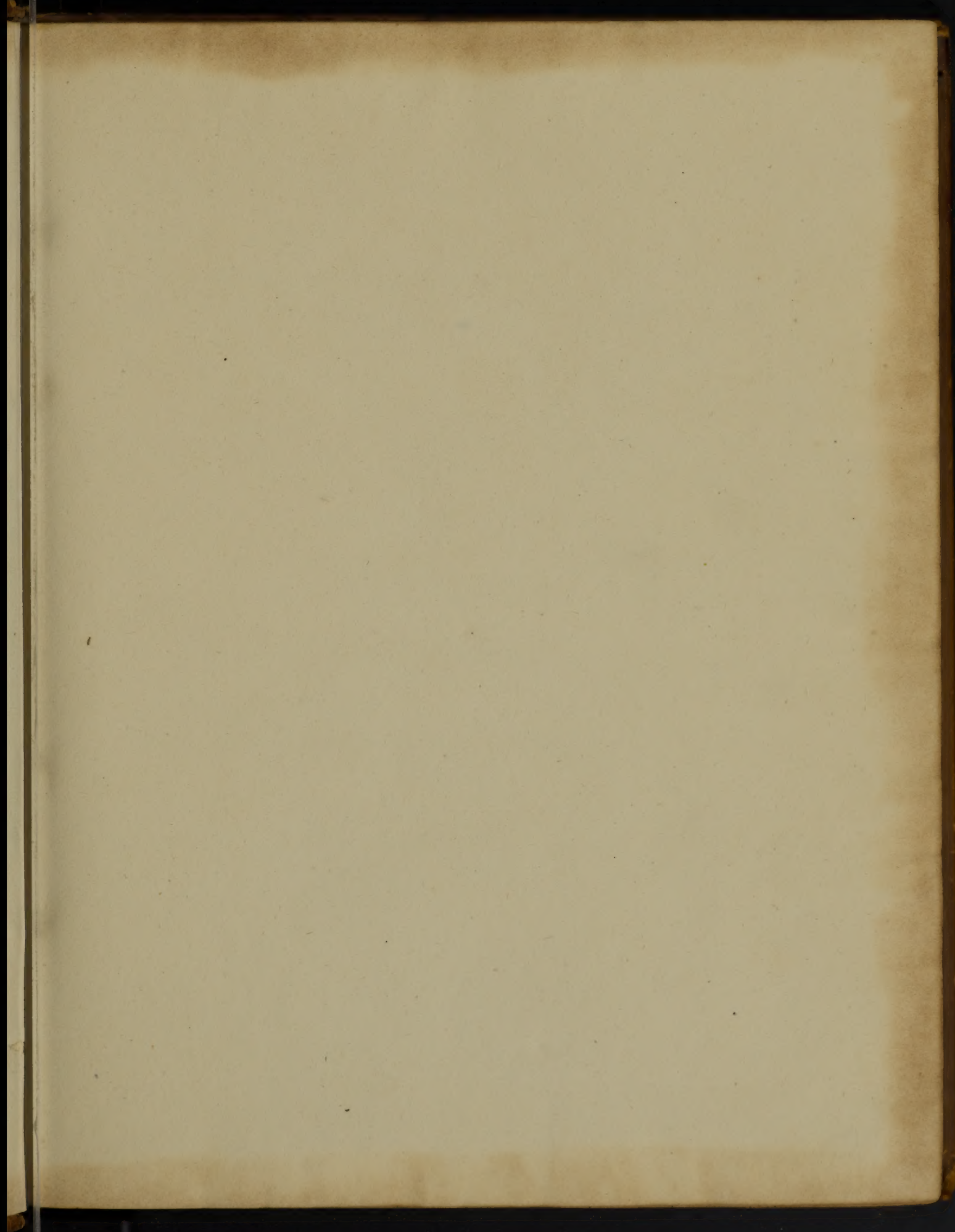


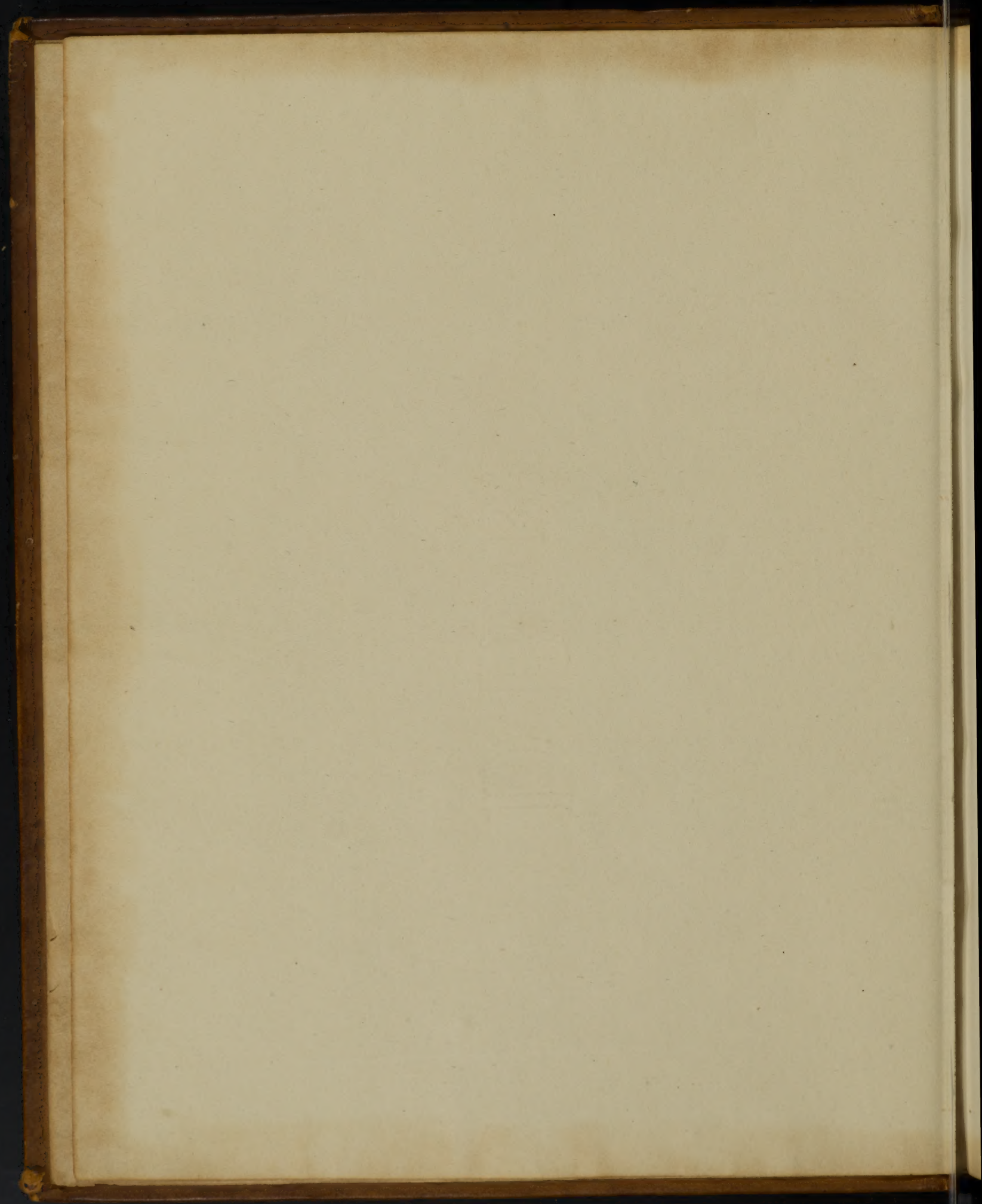
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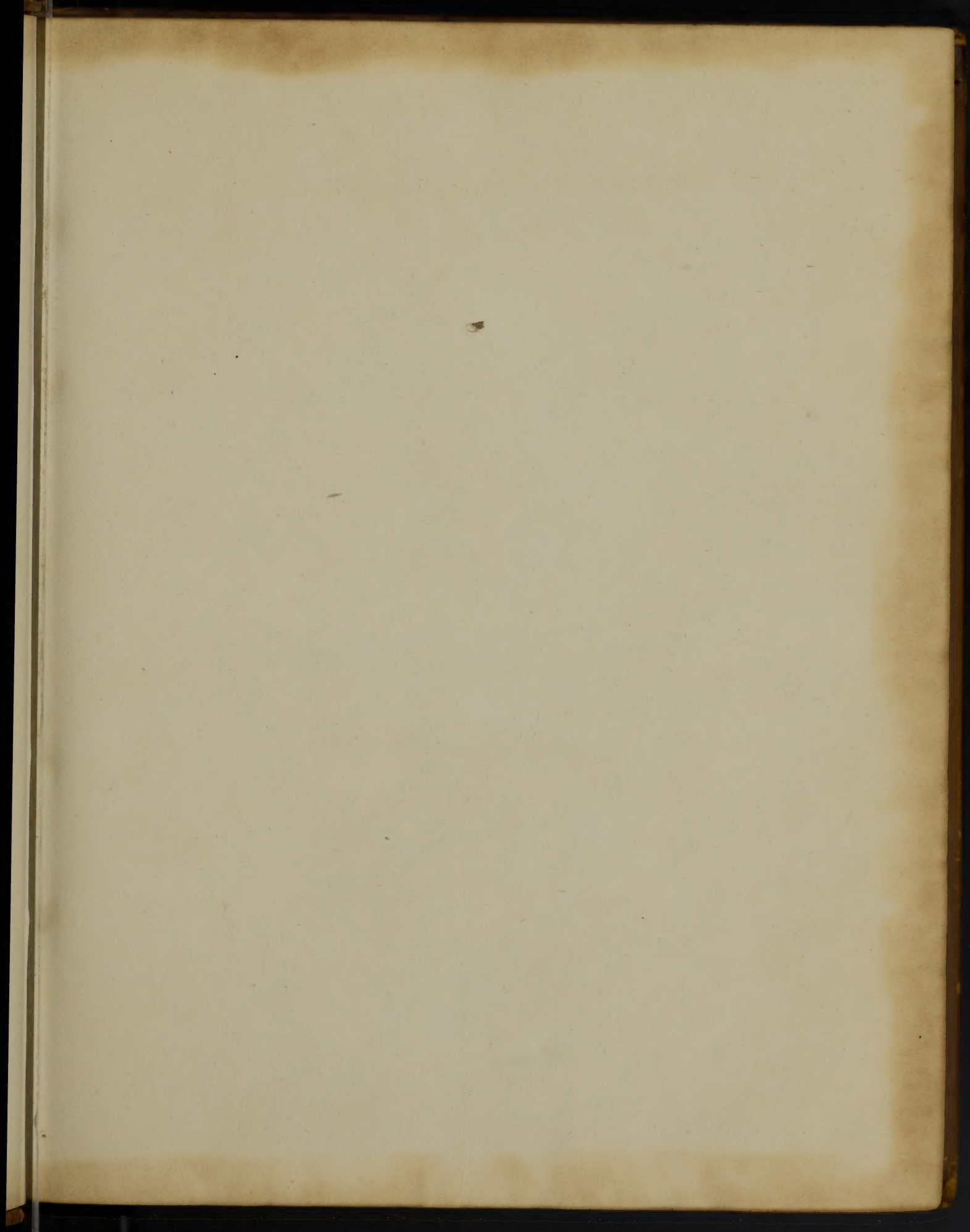
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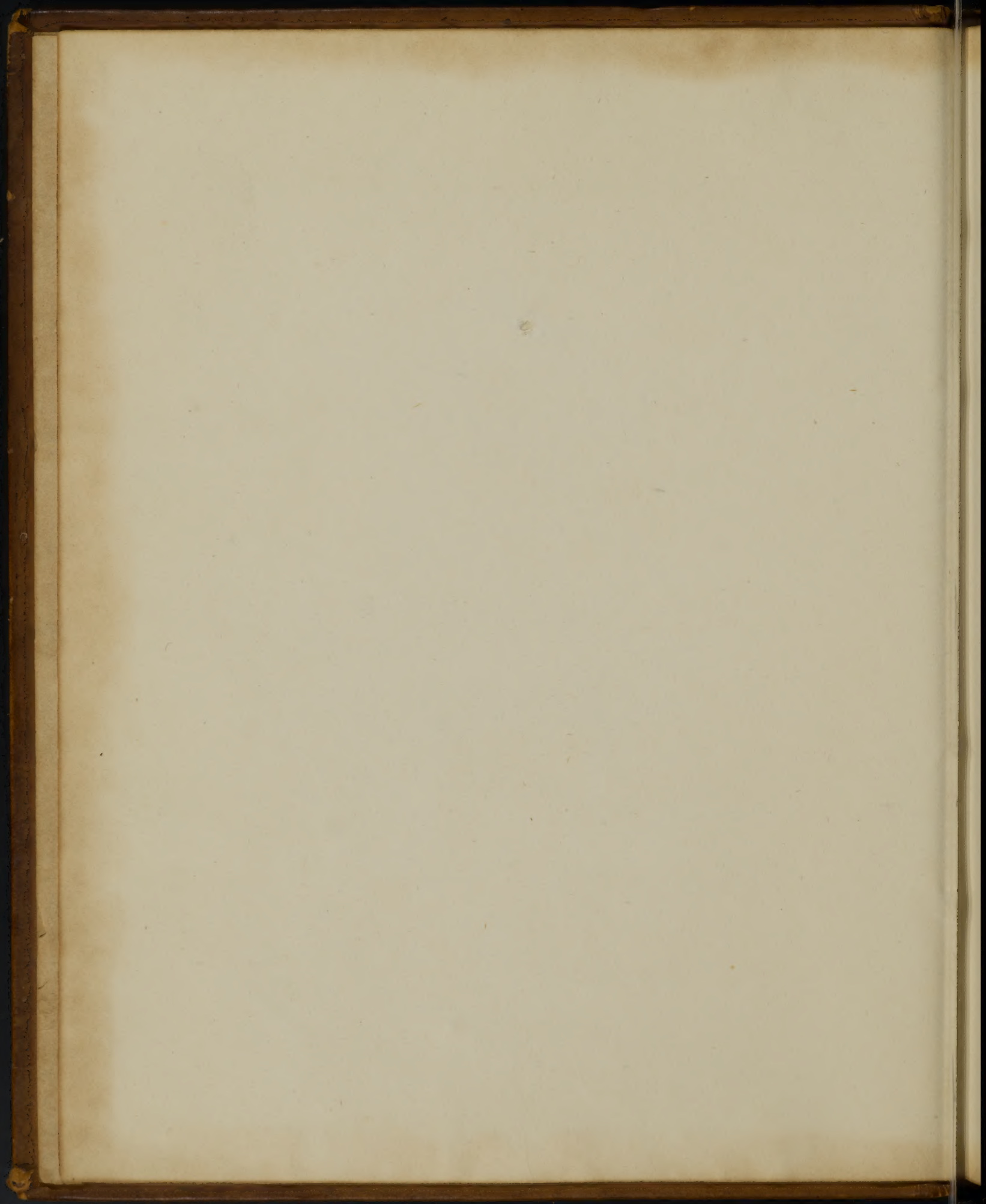


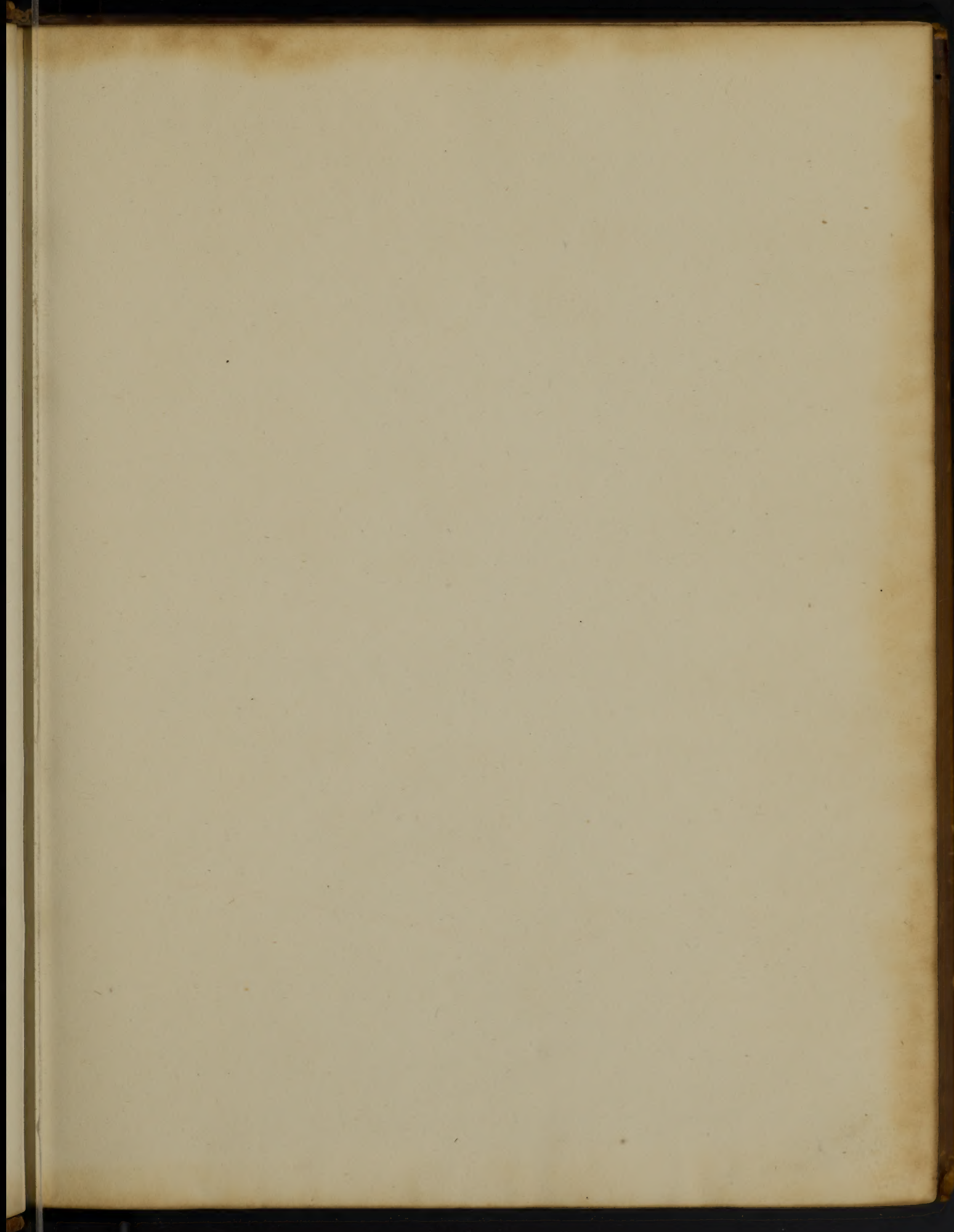


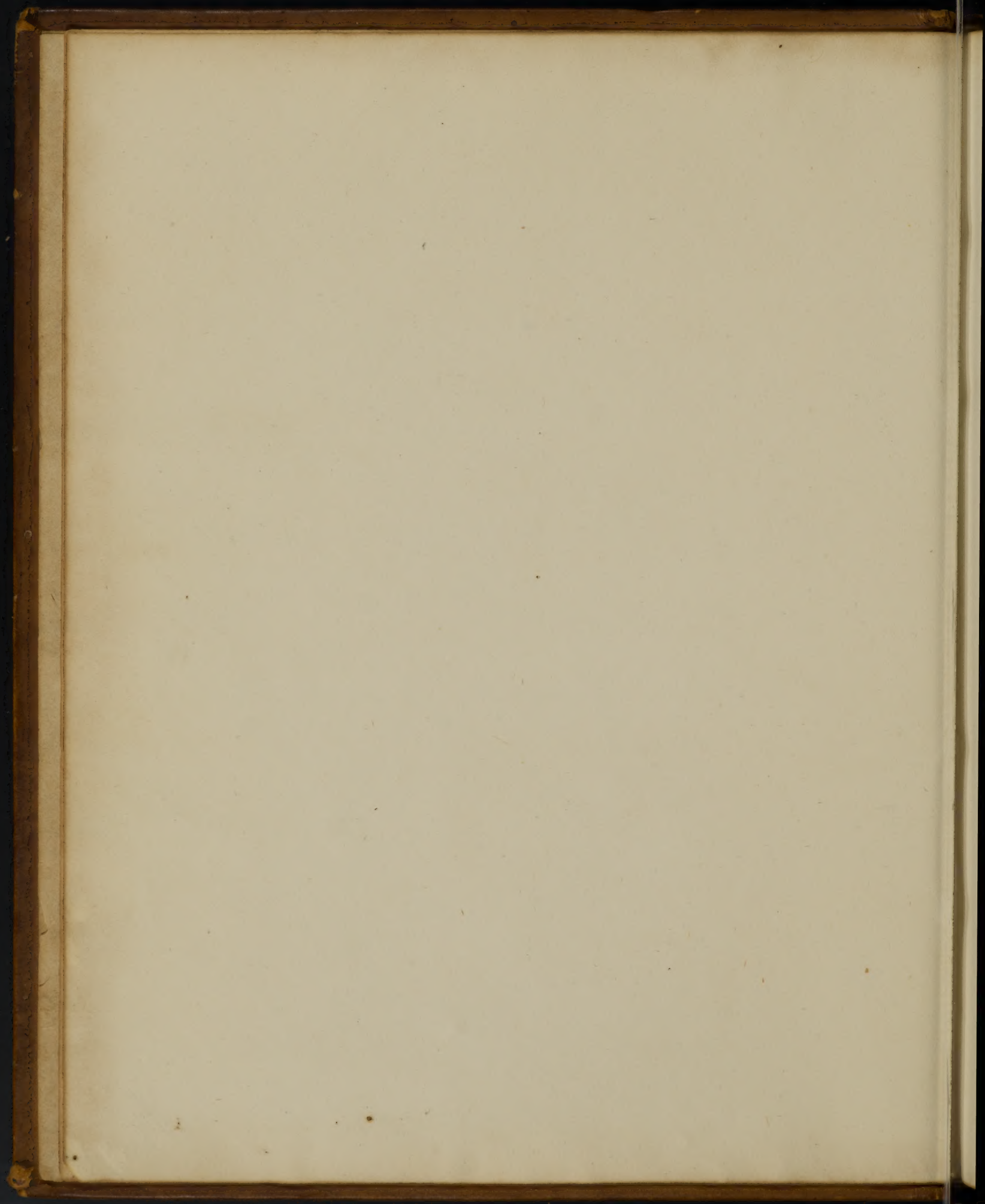


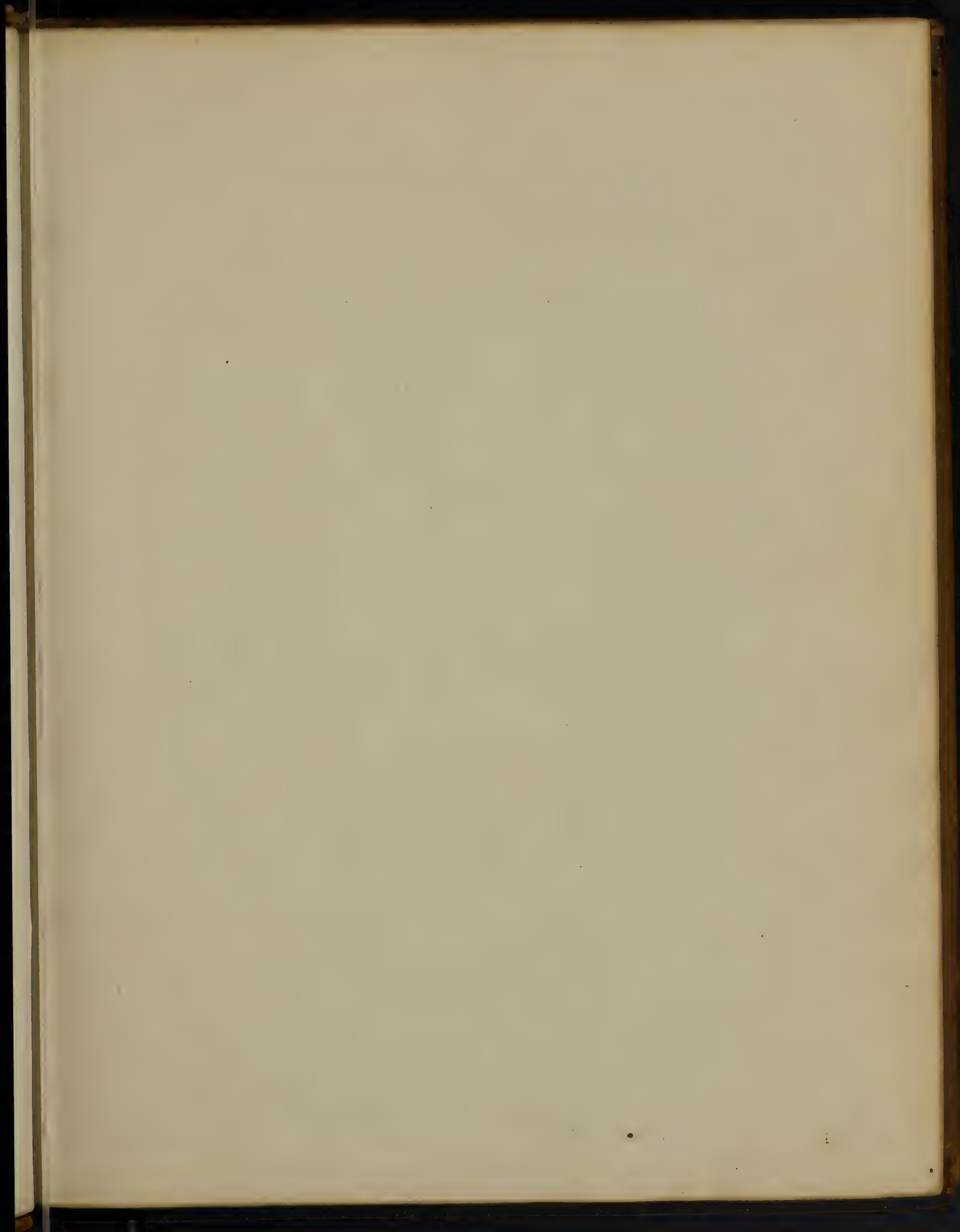


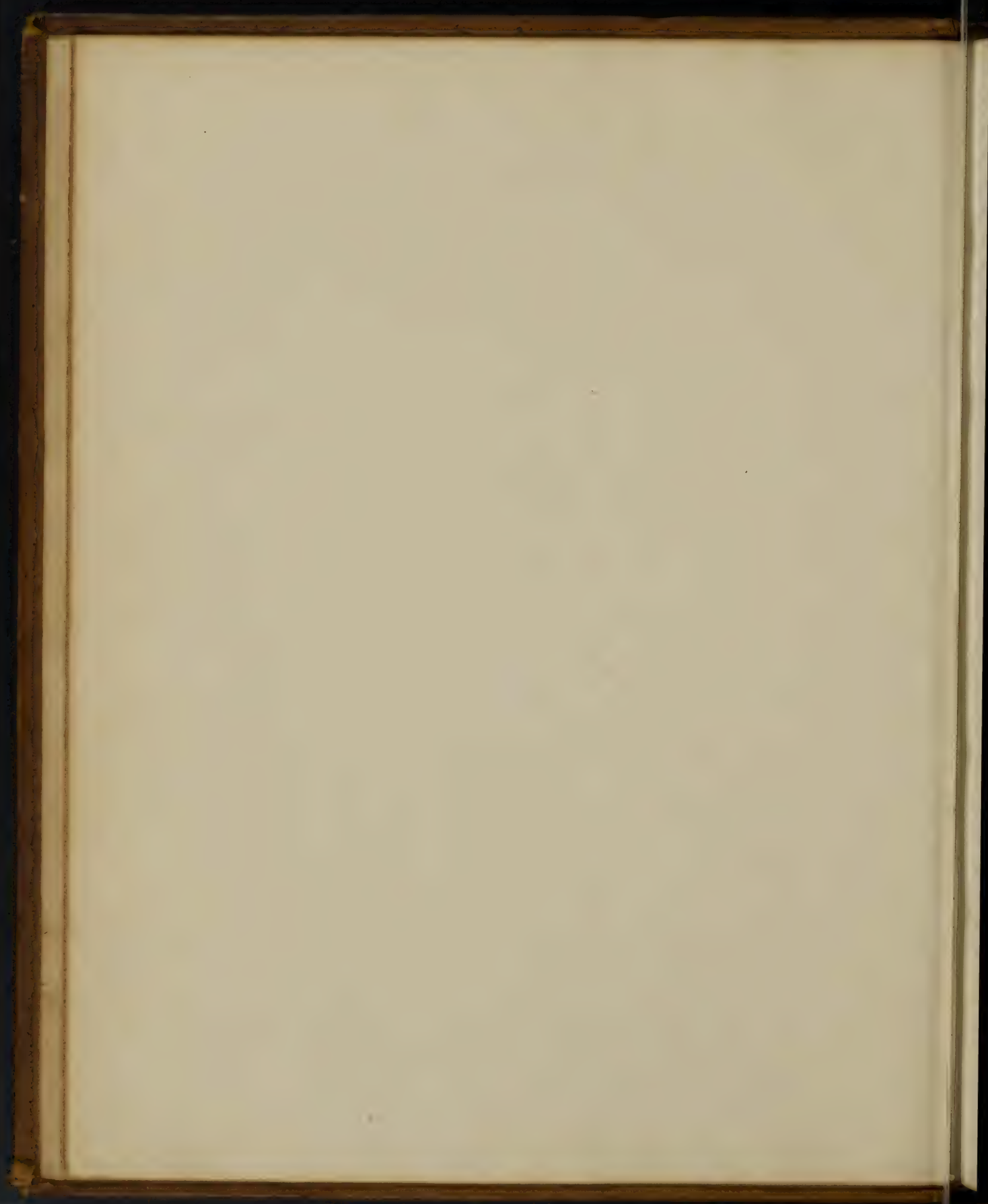


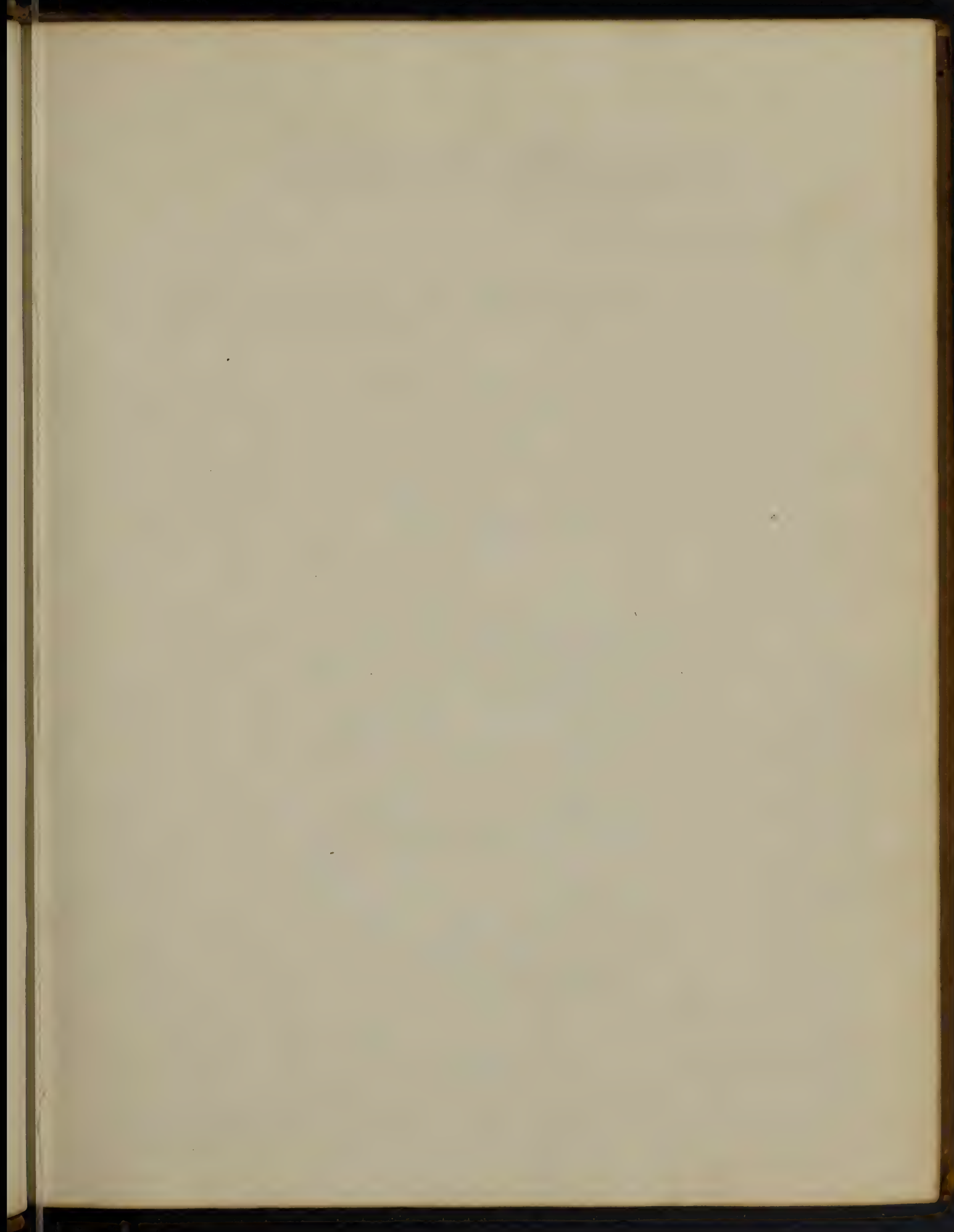












34-833

Private Strongs.

By Mr. Gould

Of the Action of Slander.

Slander consists in maliciously defaming a person.

I.st By words written or spoken which tend to injure him in point of personal security, connections, office, profession or interest. 4 Bac. 488. 4 Co. 14. Bul. 9. 3 Bl. 123 Esp. 496.

II.nd Without words, as by figures pictures &c. of the above tendency. Esp. 496. 3 Bl. 125. 5 Co. 125.

Committed according to the usual division in three ways.

1. By writing. 2. By words, 3. By signs pictures, &c.

Real Slander or Slander by words is of 2 kinds. 1st Of words in themselves actionable, 2^d Of words not actionable in themselves, but becoming so by means of some special damage, accruing to the person of whom spoken in consequence of them. 4 Bac. 483. 494. If the judgment of Law words actionable in themselves are abstractedly injurious, then you the pett in his Declaration need state no special damage to himself in consequence of them. But when the words are not in themselves actionable, but become so from some supervenient cause, they are not abstractedly considered in judgment of Law injurious; therefore till in consequence of them some special damage has accrued to the person of whom spoken, he is entitled to no action, then he must state the special damage & prove it on trial.

* The words which the title come within the title thereof. If not from the title title. The rest are copied verbatim from the notes. T. Gould.

Private Wrongs.

Slander.

The General rules relative to oral Slander, apply
to written: (^{2 Co. 14.} 2nd 081.) But.

1st Of Oral Slander.

According to the definitions, Falzity and Malice must
concur to constitute Slander. Malice what.

General rule: That.

Words in themselves actionable to P^{ts}, may recover
damages, proving the words; for damage is implied. This
is a general rule but there are some exceptions; and such
words *prima facie* import malice. But this presump-
tion of malice may be rebutted by proving that they were
spoken under circumstances, which exclude the inference
of malice. 4 Bac 483 Bul. 6, 15 R. 11, argued supported to by Sackville.

Classes of actionable Words. 1st Those which bring
the person of whom spoken to into danger of legal pun-
ishment. 2nd Tending to exclude him from society. 3rd Injur-
ing one in his trade or profession, 4th Tending to injure one
in his office. Finch L. 185. 3 B. 122. 4 Bac 483. 492.

2nd Bringing into danger of punishment. If the false
words charge a fault which (if true) would incur corporal
punishment, the words are clearly actionable. E.g. charging
a man with Treason, felony, perjury. perjury 8 Co 115.
4 Bac 483. Cro E. 635. 602. 609. 1 Roll 65. 6. 49. 637. 2 Wils 77. 156. 4 Co 2 a
Cro Jac. 114.

According to this classification words may be ac-
tionable per se, tho they do not injure ones reputation
& they may injure ones reputation, tho they not be actionable.
Words charging what would subject to transportation

are actionable. So. to carting. 4 Bac 486, pl 45. 1 Roll 36.

Words charging what w. subject to imprisonment are actionable. imprisonment being corpora punishment. 1 Com 179. 1 Roll 46, l. 15. 28. Salk 894 2 Vent 266. 4 Bac 406. 7 Com 134. Cro E. 106. 315 Finch's L. 185. 1 Strum. 46 X Salk 895 denied in 4 Bac 487. 3 Wils 186.

In the case in Salk, the charge of legelling a Bastard was decided not to be scandalous, tho' the Stat 18 Eliz. mentions in Salk, subjects to imprisonment of the Bastard is chargeable to the parish. The decision however is consistent with the rule, for ye charge was not that the Child had become a charge to ye parish, nor was it so stated in the plff's Declaration, consequently it was bad on Demurrer.

Words charging what w. subject to a fine, are actionable or not as the fact charged is infamous or not. So decided by ye Sup. Ct. in Conn. Rev. As there any such rule in Eng? 4 BC 108. Case of Bawdy house. 4 Bac 487, pl 50. 60. It seems so, tho it is not clear.

Especially however lays down ye rule on this broad basis "that to charge one with any crime wh. makes the person spoken of liable to prosecution is actionable." top. 497. he cites Finch's L. 186. Rev. This proposition is certainly erroneous, & contrary to the judicial decisions, for old even a charge of mere trespass w. amount to murder, which is unquestionably not the case. 4 Bac 486, pl 27. Sid 104. Cro E. 34.

Words charging what w. subject to punishment must, to be actionable, charge a criminal fact.

Private Wrongs.

Slander. 3

committed. Charging with evil intentions not sufficient. 10 Mod 51. 23. 1 Com. 191. 4 Rep 496. E.g. "he gave J. S. counsel to kill me" &c. not actionable. 4 Co 16. So "I expected to see him indicted for stealing" not sufficient. Hut. 18.

So "He is in jail for stealing a horse" not sufficient. 2 Wm. For words of a similar import holden sufficient after verdict. 2 Wils 300. Hut. 4. 4 Rep 497.

Adjective words under this head are actionable or not as they presuppose an act committed or not. E.g. To call one "Seditious", "Thievish", "Traitorous" &c. not sufficient, not scandalous, for these adjectives only suppose a seditious, thievish, traitorous by intent, & not an act actually committed. But to call one "perjured" is sufficient; for the adjective perjured presupposes the crime committed. 4 Co 19. 18.

"He is perjured" not actionable unless it be added "in a judicial proceeding" or "in such a Court". 4 Wm 484. 4 Co 15. Cro. 609. 3 Den. 166.

To call one "a Chief" &c. after a general pardon is actionable. Pardon clears from guilt. After pardon he is not in judgment of Law a Chief &c. he is thereby made a new man. So if the particular theft &c. had been pardoned. 4 Rep 497. Hut. 51. 4 Bac 487. 3 Ld 52. 3 Bac 516. 5. May 22.

Private Wrongs

Slander.

So charging one with having committed a crime of which he has been acquitted, is actionable. 4 Bac 487 pl. 52. Owen 150. There is no danger of punishment. But such cases must stand on some other principle than that of this tendency to subject ye person charged, to legal punishment, for by ye acquittal all danger of punishment ceases.

If the words charge a crime which it appears could not have been committed they are not actionable. E.g. "He has murdered J. D." J. D. being still alive. Esp 48. 4 Co 16. Bal. 5.

But this matter may be pleaded in Eng. it cannot be given in evidence, & is a mitigation of damages. If the plaintiff state him to be alive, in his declaration, it might be demurred to. But 5. for ye principle.

If to the words charging a crime a description not corresponding with the crime charged be added, the words are not actionable. E.g. calling one a thief, because he had committed a certain act which amounts only to a trespass. 4 Bac 510. 585 pl. 27-8. Sid. 104. 1100. 51. 674. 4 Co 13. 14. 19. Bal 5. Esp 511. 517. 2. Str 70. 335.

But charging a crime & tho' the prosecution for it is barred by the Stat. of Limitations at the time of the words spoken is actionable. Decided Sup. Ct. Conn. 1923 Webb v. Fitch.

If words in themselves actionable admit of an innocent meaning a libel on Defendant to show they were used in that sense. Peak 40.

If the punishment of the crime charged is in the alternative; the words are actionable if the punishment may be compared to charging one with being the

Private Wrongs.

Slanders.

Father or mother of a bastard which has been charged -
or is at least - for no father is not liable to imprison-
ment unless he disobeys the order of justices. 1 Bac 317.
Cro. C. 315. 4 Bac 486. Salt 694 4 Bac 487. fol. 57.

2nd Tending to exclude from society. As to charge
a man with having a contagious disease. 2 Ep 498. 3 BC. 123.
Cro. J. 144. 1 Roll 44 2606. 219. 1 Lev. 205. 4 Co 17. 4 Bac 488. 1 Com 488.

But the words to be actionable under this head
must charge a present disease. 2 Stra 1189. 2 St. R. 473. Who
formerly, if it were of a past one, it was scandalous. Cro.
J. 219. Cro. J. 430.

Under this head adjective words in the present tense
are actionable. 12 Mod 248. 4 Bac 488. Cro. J. 144.

3rd Tending to injure one in his profession or trade. Eg.
calling a Lawyer a knave is actionable. 4 Bac 490. 1 Com.
182. 2 Ep. 498. 3 BC. 123. Finch L. 186. 1 Roll 52 C. 35. 536. 5. 15. 52. 54
1 Com 182. 2 Vent 28.

So "He has revealed his private secrets. 1 Roll 57. C. 50.
1 Com. 182.

So "He is no Lawyer", no more a Lawyer than the
Devil. 1 Roll 54. 3 Wils 57.

So in general charging a Lawyer with ignorance
in his profession. Cro. C. 382. 2 Ep. 498. 1 Lev. 247. 1 St. R. 527. 1 Roll 54
4 Bac 491. 2. 1 Com. 182.

In these cases however the Lawyer must state in
his declaration, that at the time of the words spoken
he was a practising Lawyer. Sides 231. 4 Bac 491. 2 Vent 28.
2 Ep. 207. 4 St. R. 386. Proof of perf. acting as a Lawyer holds suf-
ficient. 4 St. R. 386. 2 St. R. 487.

Private Wrongs.

Slanders.

To falsely calling a trader a Bankrupt is actionable. To "He is a Bankrupt. now". To "He will be a Bankrupt in two days". 4 Co. 19. 2 Stra 762. 10p 499. 1 Com 180. 4 Bac 493. Tidd. 299. Carth 330. 1 Rose 61.

To change with cheating his Creditors & advising not to deal with him is actionable. 4 Bac 493. 2 Lev. 62. 5 Kay. 1490. 1 Com. 180. Burr 1688.

In actions by Tradesmen in these cases it must appear by laying a colloquium, or otherwise that y^e words were published with reference to his trade. 4 Bac 492. Salt. 694. Stra 646. 1169. 5 Mod 398. T. Ray. 61. 169 2 L. Ray. 1417. Eg. "He is a cheat", here a colloquium concerning his trade is necessary to be laid. But if the words were "He is a Bankrupt." it wd. be sufficient. (I suppose) merely to aver that he was a Trader &c. 1 Lev. 115. 250. 4 Bac 492. 2 Lev 62.

"Do not deal with him, he is a cheat" &c good without a colloquium. 2 Lev. 62. [It is not necessary to lay a colloquium, whenever from the words themselves it is inferable they were spoken of the Trader or of that they were spoken of his trade &c.]

To call a Clergyman a "Liar" has been decided to be actionable in y^e Sup. Ct. in Conn. & that decision was affirmed by y^e Ct. of errors. Bacchus v. Bishop.

In Eng^d to charge a Clergyman with "preaching Lies" is actionable. 3 Lev. 17. 1 Com 191. 1 Rose 38. 36.

To call him a "Drunkard". 4 Bac 490. To other points as calling him a Rogue &c. see Coup 257. Stra 946.

To call a Physician a "Quack" is actionable. 1 Rose 54. 1 Com 182. To say he has killed a patient" said no

Private Wrongs.

Standards.

to be actionable. (Bro E. 620.) unless it be added "knowing" or "wilfully" or the like. Justice Clinch was opposed to the decision. And the correctness of y^e decision may be questioned as it supposes ignorance in his profession. 4 Bac 491. 11 Mod 221. ¶ Dec. Is it not overruled by the decision in *Modena* ¶ See *Mod supra* where y^e same words of an Apothecary were adjudged actionable. Rule as to Lawyers *Supra*.

With regard to Mechanics it may be laid down as a general rule, that any words tending to injure a Mechanic in his trade are actionable. 4 Bac 491. 2 Stra 591.

4th Tending to injure one in his Office. words charging one in an office of profit, with want of ability or integrity are actionable. 4 Bac 488. *Ex p* 500. 2 S Kay 1296. 1 Com 180. Salk 695. 1 Mod 68.

But words charging a person in an office of trust or honor (not of profit), with want of ability are not actionable. 4 Bac 489. 438. 73 Salk 695. But a charge wh. impeaches his integrity is actionable whether it be made vs. a man holding an office of trust, honor, or vs. one holding an office of profit. Salk 695. Stra 59. 2 S Kay 1369. 4 Co 16. 7 Mod 140.

¶ The reason given why a charge of want of sufficient ability when made vs. a man holding an office merely of trust, honor is not actionable, is, because a man cannot help his want of ^{official} sufficient ability. But does not this reason apply equally well to such a charge made vs. one holding an office of profit? It surely does. And Judge Russell would think that such justifies the action in all the cases.

Private Wrongs.

Slanders 3

cases of slanderous charges made not men in office is the tendency they have to injure; it as a charge of want of ability has as great a tendency to injure, as a charge of want of integrity, therefore it ought to be equally actionable. Consequently then the distinction is an unsound one on principle. *H. B. P. 7.*

The distinction is clear in the Books however, & there fore calling a Justice of the peace "a Bulle headed Justice" is not actionable. If the office of a Justice of the peace is considered as one of more trust than honor. *ff. Salk 695.*

Charging a person in office, in either case, with inclinations and principles which disqualify - sufficient - without charging any act. *Bul. 5.*

Colloquium. When the words spoken do not of themselves import to have been spoken with reference to ^{the} official character, a colloquium is necessary. Thus if one speaking of J. S. in his official capacity of Jus. of the peace, says he is a Knave, meaning that he is a Knave in his capacity of Justice, the charge is actionable, but if words must be laid with the colloquium to show that they relate to the official capacity of the ^{plff.} *ff. 1. Ray? 1364. Steu 618. 4 Mac 489 pl. 88. 2488 pl. 74. 12 W. 280.*

But if the words themselves do import a reference to the official character no colloquium is necessary to be laid. e.g. "J. S. is a Knaveish Justice." *6 W. 1. 557. 12 W. 280.*

And it may be laid down as a General rule [applying] to all professional men, to trades & mechanics as well as to men holding offices; that when the words spoken are not in themselves actionable, but as they refer to some collateral thing which constitutes the ground of action; to which

Private Springs.

Glander,

the words themselves do not upon the face of them refer, an avowment of a colloquium is necessary. E.g. To say of one who is a trader "He is a cheat." Folios 308. 2. 2. 307. 2. 301. 2. 1164.

Colloquium said by Espinazo (514) to be necessary, when a trader is called a bankrupt. No authority cited by Espinazo & see 1. 2. 280. When the words were "He is a sworn justice" & colloquium held unnecessary. 4 Bac 515. pl. 55. So calling a physician "no scholar". 11 Mod. 54. Laro 6. 270. 196. 4 Bac 515. pl. 55.

Ho (2. 2. 62) saying of a tradesman "Do not deal with him he is a cheat" &c. colloquium held unnecessary.

So "he is a knave, compounded with his creditors" &c. Colloq. held not necessary. 5. Kay. 1480. 4 Bac 513. pl. 36. 515. Laro 240. Esp. 502.

Of Innuendoes. If the words themselves do not show their own application by designating in express terms, the subject matter, or y^e person, innuendoes are necessary. E.g. He (meaning the p^{er}) 1. 4. Co 17^b.

It is a rule (laid down by Coke) that "nothing is to be otherwise certain, can be reduced to certain, by an innuendo." 4 Bac 516. 4 Co 17^b. This rule is not accurate, if you if taken literally an innuendo w^d be a mere nullity. The rule thus laid down w^d be more accurate; Any thing, which taken in connection with all that passes before, between the parties to y^e conversation, remains uncertain, cannot be made certain by an innuendo. It can make certain only by a reference to something said &c. before which is certain. 4 Co 17^b. 11 Mod. 73. Camp 584.

an innuendo can therefore never extend y^e meaning

Private Wrongs.

Slaves.

of the words beyond their proper import. e.g. I. S. barn or my Barn (meaning a barn full of corn) innuendo not good. But if it had been averred that Def. had a barn full of corn, & that in a discourse about that barn, the Def. spoke the above words, y. innuendo w^d have been good. Coups 684. 278. Esp. 511. 4 Co 20. Cro E. 834.

So "He stole half an acre of my corn" (innuendo - "the corn which grew on half an acre after it was reaped") innuendo bad. Cro E. 428. 11 Mod 82 pl. 1. Coups 684.

When an innuendo is unnecessary, a bad one is surplusage. e.g. "He was perjured." (innuendo - "in a certain case exhibited in such a Court") innuendo is bad, but the declaration is good. 4 Bac 516. 11 Mod 83 Cro E. 609. So "he has perjured himself" (innuendo "in such a Court") innuendo impertinent.

So if the person is an villain from y. words published, an innuendo cannot make certain. e.g. "one of the servants of J. S. is a thief" (innuendo "the p^{er}son") this innuendo is not good. Esp 511. 4 Co 17. 1 Sid. 52. Cro E. 447. Hob. 2. 40.

Thus far as to innuendoes. I shall now return to y. subject of words tending to injure one in his Trade &c.

When an action is brought for words tending to injure one in his trade, profession office &c. it must appear in y. declarat. that y. p^{er}son was at y. time of y. words spoken at such a trade, profession office &c. Esp. 514. Huc. 49. That "Def. has been a trader, Merchant &c. for many years past," not sufficient. Cro E. 794. seems no judgment - Cro E. 205. Cases contra, which say he shall be presumed to have been a trader at y. time see 4 Bac 513. Cro E. 278. Yelv. 159. Cro E. 222. Cro E. 282. 1 Sid 425.

Pirate Wrongs.

Slender. 3

From this it appears that it is a Law what argument is necessary to show that present quality. The criterion however seems to be that if it fully appear in the Declaration that ye plff. was a present trader, it is suff. but that must fully appear in the declaration may be demurred to. But as to what arguments do make this fact fully appear it is perceived there are (supra) many contradictory cases.

In a case of a trader it is necessary according to the Eng. Law to aver "that he gains his living by buying & selling." Esp. 518. 1 Str. 299. & Du. 12. This be necessary in U.S. when it is settled that a trader, & one who gains his living by buying & selling are synonymous.

It is laid down in some of the Books that words of heat & passion, are not actionable. Esp. 520. 4 Bac 522. 1 Lev. 49. 3 B. 185.

The meaning of this rule is not explained in the Books, it must not however be taken literally. But ye rule is this, when they import no definite charge, as "Rogue" "Villain", "Rascal" &c. they are not actionable. Then expressions of heat being more vague terms. So perhaps when wantonly provoked by plff. they are not actionable. But see case of Duff in a passage from unprovoked anger utter actionable words. 2 Le Roy R. 335.

Of the Construction of Slander.

The rules of Law upon this subject have been at different times entirely different. At first, actions of Slander were very rare. But in the times of James I. they had become very common even for trivial charges.

Private Wrongs.

Standard.

to curtail this except a Stat. was passing y^e 21. James.
 ¶ That in all actions for Slander & defamation where
 the damages given did not amount to 4th of the plaintiff's
 recover no more costs than damages. The Ct. actuated
 by the same spirit of provocation adopted the mode of
 construction, called the construction in mitiori sensu;
 a construction which gave the Slandorous words, if it
 c^d possibly be done by any straining, twisting, or tor-
 turing, an innocent meaning. Under this rule of
 construction the tongue of slander might inflict its
 wounds with impunity. The probability of recovering
 in an action of slander, became so extremely slight
 that but few were hardy enough to commence one.
 The Ct. afterwards observing the hardship, injustice,
 absurdity of this rule of construction, went into the
 opposite extreme, & tortured if possible the words & in-
 terpreted them into a criminal & slanderous meaning, & adopt-
 ed the construction in Severiori sensu. The injustice
 of this mode of construction was soon felt, & became
 ameliorated by degrees to its present standard. Therefore
 the rules of construing words in mitiori sensu and
severiori sensu are now exploded. They are to be taken
 in that sense in which they w^d naturally be understood
 by y^e hearers. Esp 511. 4 Bac 497. Cowp 688. 2 D. 4 Bac 505. Bul 4
 10 Mo 198. Kirby 12. Peck 4 N. 2 Mo 159. 3 D. 2. & P. 1061. 5 East 463.

Where words in themselves actionable, admit of an in-
 nocent meaning, it lies on Def^t to show that they were used in
 that sense. Peck, Cas 4. 2 & N. 12. 335. 1 Vin. 507. 1 Johnson 279. 2 B. 180.
 Where a suit can be brought, how he understood them. Comb.

Private Wrongs.

Slander. 3

Slandrous words in a foreign language, actionable if understood by any of the hearers. Secus not. 4 Bac 448. 11 Mod 74. Cro E. 865. Hob. 126.

All the sentence is to be taken together. esp 511. - If the subsequent words may explain the former, so as to fall short of slander - as in case of us a description as did (see supra). 4 Co 14^a. Bull 4. 2. 11 Mod 159.

Courts will not do violence to language to find an innocent meaning. Esp 512. E.g. "Your husband did of a wound you gave him". Sufficient - tho the wound might have been given by accident. Pitts Rep. 243. Bull 4.

So a forced construction will not be given to make words actionable, which bear an innocent meaning. esp 512. E.g. "He is a common maintainer of suits of a Lawyer. Hob. 117.

It is a general rule; that the words must be actionable, imports a direct charge of a slanderous nature. If the charge can be drawn from the words only by inference they are not actionable. esp 512. E.g. "J. S. got his manor by swearing & forswearing", not actionable. 4 Co 15^a.

Yet where the intent to charge a crime (or any thing else of which the charge is actionable), is clear the words are actionable, tho' somewhat indirect.

11 Mod 49. C. 45. Ryder. 160. E.g. "I will make you an example for a perjured knave" esp 512. Bull 4. 1 Com. 185.

So "I will prove that he poisoned J. S." 1 Com 185.

11 Mod 50. C. 1. 5 Cro E. 569. 1 Sid 381. 1 Vent 276.

Pirate Wrongs.

Slander.

So "when will you return the ship you have stolen?" has been decided to be actionable. 1 Com 186. 11 Mod 45. 2 Roll 165. 12 Co 139.

Of the Pleadings.

It is laid down as a general rule that "Falsity" and "Malice" must be averred - or in other words that the charge must be averred to have been made "falsely and maliciously" in the Decl^y in an action of slander. Maliciously seems not necessary, for malice is prima facie implied. 1 Com. 196. 4 Bac 512 pl. 8. 1 Kibb 273 May 35 Owen 51. (Qu. if the words are not in themselves actionable?) - A direct averment that the words were false not necessary. "Falsely published" sufficient. Esp 516. Bull 8.

The Decl^y usually states that the plff. is of good fame & reputation &c. It is not necessary. 1 Com. 195.

The form of declaring in an action of slander is, that the words were "uttered & published", & to support the action it is necessary that the words sh^d. be uttered & published. Now alleging that the words were spoken "openly & publicly" is sufficient without saying "in the hearing" of such & such persons. So alleging that the words were spoken "in the presence of divers persons" is sufficient. 4 Bac 512. Cas 2. 861. 486. 11 Mod 57.

Malice what.

Pious Words.

Stander. 3

It is a general actionable words prima facie
imply malice, the presumption may be, by circum-
stances rebutted. E.g. In case of confidential communi-
cations, which exclude the probability of malice.
As the character of a servant, given by a former mas-
ter or mistress, or reasonable enquiry, the false mal-
ice must be proved. 41 Burr 2422. 15 R. 110. 13. & 8. P. 8. Lord
Jac 91. 4 Co 91. 43p 20 502. 3. 53p 13. 110 Burr. 3130 50 P. 587. 7 East 493.

So where one confidentially by way of warning to
another said of a trader "He will be a Bankrupt soon",
you had better not deal with him" the words were taken
not actionable the special damages were stated & the
assertions were taken yet the circumstances were such
that it was presumed not malicious. 7. 43p 503. 13. & 8. P. 8
30 R 60. 61. argues

So of words used in the course of legal proceedings.
e.g. Allegations in articles of the peace. 43p 503. 5. Sears
of 91. & applied to has no jurisdiction of the matters
charged. 4 Co 14 Lord E 230. (Qu. 1 Sand 131. 2 Burr. 807.) case of Whit-
neph. S. C. (13 43p 1048. 2 Burr 269. 2 Burr. 11.

Retailing Stander.

It is a general rule that the retailing of Stander
fabricated by another is actionable. 43p 517. Bull 10. Sears
if he truly names his author at yr time. 12 Co 133 534
Cro 2. 400. 3 Burr 225. 7 R. 17. 2 East 426

But circumstances are essential to be regarded
as to the intent. 4 Burr 498. If then the intent & manner may
be such as to remove the presumption of malice tho

Private Wrongs.

Slander.

the words were false & in themselves actionable, thus forming another exception to the General Rule, that words in themselves actionable are prima facie malicious, p. 6. q. Where one in the spirit of concern said "I have heard that J. W. was hanged for stealing" &c. no action lies. 12 Rev. 1822. 4 Co 14. Bull. 9. 10.

Defends suspicious no justification, if tho they arise from some probable grounds - i.e. of words in themselves actionable p 318 Cro C. 38.

Words excited by pressing or provoking questions by the person of whom they are spoken, will not support an action tho they be otherwise actionable in themselves. 4 T. 2. c. 4. 98 Cro C. 297. E.g. "Have you say I am poisoned?" Answer "yes. if you will have it."

Of the General Issue.

The General Issue is in Eng. a denial either that the Defe spoke the words, or that they are actionable for want of malice; as in the case of confidential communications. supra. 10. 7. 10. 110. Bull 8. Esp 503. 517. 12 Rev. 82.

In law the General Issue includes all defenses, even tho the words were true, or otherwise justifiable, except such as arise from some act of the p. &c. amounting to a discharge of which the p. &c. to avail himself must show specially &c.

The General Character of the p. &c. as to the crime charged by the words may be proved in mitigation of damages. 11 Co 1 354. 450. But other particular acts of the same kind as those charged cannot be shown as charges of particular acts Bull 296. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Private Wrongs.

Slander.

In Eng. a special justification, cannot be given in evidence under the Gen. issue. esp. 513. (In Conn. it always may) e.g. That y^e words were true, cannot be given in evidence under a Gen. issue. 4 Co. 16. 5 Co. 125. Stra 1200. 100 Eng. 373.

In Eng. the truth of the words cannot be given in evidence even in mitigation of damages. Stra 1200 Esp. 513 Bul. 8. P. 9. 80 cit^d contra. [It may be some reason that it may not be admitted to overture the action viz. that as the p^{ty} must be ignorant of the Defendant's intention to make such a defence he is not prepared to meet it, & therefore it is not allowed.]

Of the Justification of Slander.

The truth of the words is always a good justification. 4 Bac 516. 1 Roa 87. Bul. 8. 9. cit^d contra.

So sometimes Def^t. may justify tho the words are in themselves actionable & false. As when false words are published in a course of justice. e.g. in a Declaration or Count brought by Def^t as p^{ty}. 4 Bac 518. 499. 1 Com 194. Esp 573. 4 Co 14. Cro E. 230. 248. Hob. 82. Hutton 113 or 43. 1 Note 43. Or in articles of the peace. vide 3 Esp. 32. - words used in giving charge of another to an Officer. [This is on the ground of public policy, because it w^d have a tendency to prevent the administration of justice if for words exhibiting Contumacious in a course of justice the party exhibiting the charge were to be liable for slander if on the result the words were false.]

But if the party charges crimes not cognisable by the jurisdiction to which they are exhibiting a charge of slander before the County Court, an action lies there.

Natural Wrongs.

Slander.

- it is no justification. Exp 503. 4 Co 14 s.c. Cro E. 230. 248. Hob. 267. 206. 1 Rolle 34. 1 Com 194. If of their slanderous quality, it is no justification to plead they were exhibited in a declaration on Court, for where charges are so exhibited to a Court not having jurisdiction it is done coram non iudice. Sed Quere see 2 Lut. 1571. 1 Haw. 13. 1 C. 73 § 8. 1 Sand 132. 10 s.c. 1. Cro 9432. 5 Esp 12109. 10. n.

So, on the other hand, the person charged in such declaration, or articles of complaint, (the they were exhibited under oath,) may justify, saying that the complainant has sworn falsely. For this is in his defence in a course of justice. 4 Bac 497. 5. 18. 1 Rolle 87. 21 s.c. 307.

So he may say that a witness is perjured by way of objection to his admissions. 1 Com. 194. 1 Rolle 33.

Slanderous words in a complaint to a grand juror, or proper magistrate, or in an indictment, not action ubi. 4 Bac 499. Cro E. 247. 3 Leon. 138. 4 Co 14. He 6. 82. 3 Esp n. 32.

So of words used in a petition to the Legislature for redress of grievances - delivered to the members only. 1 Sand 131. 21 s.c. 310. 1. 5 Esp R. 119 n.

So of words used by way of defence, by a person accused before a Church presbytery. 5 Esp 110. n. 1 Binnay 178.

So of words used in pronouncing the sentence of a Court martial. E.g. that the charges were false, malicious & groundless. this is no libel. 5 Esp. 110. n. 2 s.c. 16. 341.

Tho' if one falsely & maliciously & without probable cause exhibits a complaint or indictment, to an action for malicious prosecution will lie. Tho' he can't maintain an action for Slander. 4 Bac 500.

It seems to be a general rule that in the above cases

of complaint &c if the course of Justice is made a mere cloak for malice an action for malicious prosecution lies. Semb. 4 Bac 500. 3 Bl. 126. Finch. L. 305. M. S. B. 116. Du. as vs. Francis furous. vide ante.

So it is a general rule that Slandorous words spoken by a witness in Court are not actionable. 4 Bac 499. 518. Cro. E. 230. 2 Buls 269. Hutton II. That he is liable as if case may be for perjury. Secus, if he goes beyond the issue and slanders a third person. Esp 504. 4 Co 14. Suppose that he so slanders a party - Is there no remedy?

So if one witness in testifying charges another with having testified falsely - no action lies. Esp. 505. 518. 1 Saurd. 131. 4 Bac 518. 1 Com. 194. 2 Burr. 807.

When by Counsel in an Action.

So - that the words were spoken by Defend. as counsel in a cause, is, in some cases, a good defence or justification, in some not so. 4 Bac 518. 498. 4 Ball. 10. Cro. J. 91. 5 Esp. 10. 110. n.

Rule of distinction: When the words (tho false) are pertinent to y^e cause & suggested by his client, he is not liable. Esp. 517. 1 Com. 194. 4 Bac 498. 518. Cro. J. 90.

But if the words are impertinent (tho suggested by his client) - or if being pertinent they were not suggested by his client (Du. as to this latter clause - no action lies w. him. 3. Bl. 29. Cro. J. 90. 91.)

Most of y^e Books however make no difference between their being suggested by y^e client nor suggested to Bul. 10. Esp. 517. 1 Rolle 27. 25. 1 Com 194. 1 Rolle 23.

Private Wrongs.

Slender.

It has been decided that for the purpose of mitigating damages in favor of a client, an advocate, may use slanderous words not pertinent to the cause. 1^o Du. 4 15ac 498. Hob. 328. 1 Roll 87. l. 10.

In a subsequent case (Stra. 462. 4 15ac 498.) it was held that an advocate is never liable for slanderous words in defending his client's cause. It is his duty - it is presumed that he was influenced by his client. Du. (Late writers do not mention the two last cases.) ¶ These 2 rules give a Counselor a great latitude of speech, or slander, indeed it appears pretty evident that they are not law. ¶

When there are two counts, one charging actionable words, the other, words not actionable, & on a plea to y^e whole, entire damages are given judgment, will be arrested & a venire de novo awarded. 8 T.R. 564. -

Secus if the words are all in one Count. (10 Co 130. 3 Wils. 177. Cu E. 302. 788. Stra 1094. 1 T.R. 503. 532) unless in Count^s they are laid to have been spoken at one time. But 8. 2 Bawf. Root 346. 433. 1 Co. 131.

Private Wrongs

Slander

Of Words not in themselves actionable

In actions for words not in themselves actionable, special damage must be stated - this is the gist. And he must prove the special damage on trial or he will fail in his action. Now special damage is the gist of the action, & it is necessary that they should be stated & proved, because the Law does not from slanderous words not in themselves actionable imply damage, as it does from words actionable in themselves. For the principle see, Esp. 520. 8 T. R. 130. Nisi 6. 7.

So when the words are actionable the plff. may state & prove special damage: but in this case he can prove neither special damage than what is stated specially. (Bul. 7.) he may prove general damage as loss of custom in general, such general damage being laid. See Bul. 7. Esp. 520. 8 T. R. 133. 1 Kell 58.

What amounts to an allegation of special damage. Stra 666. Bul. 7. Kirby 65. 290. 8 T. R. 130. 1 Kell 58. Sid 396. 1 Vent 4. Crook 499.

But when the words are not in themselves actionable holden that special damage might be proved under an averment of general damage. Stra. 666. 1 Com 198. - Rev. by Bul. 4 P. 7. Kirby 290. Esp 520.

It is immaterial what the false words are, if they are malicious & occasion special damage. E.g. calling a single woman incontinent, with being a slut & by which she loses a match. 4 Bac 495. 4 Co 17.

Of Slandering a Title.

In case of slandering a title (as it is called) as calling an heir apparent a Bastard, it is sufficient to show remote or probable damage. Esp 501. Co. 213. 4 Co 17. 4 Mac 494. 11 Mod 38. e.g. If the father had signified a design to disinherit, sufficient also that the words tend to disinherit, so decided in favor of the youngest son. 4 Co 17. Esp 501.

No action lies if the plaintiff claimed the title as Heir. 4 Co 17.

One recovery of damages is a bar to another action for the same words, whether the words are actionable or not. Esp 519. Bul 7.

Of giving similar words in evidence.

It was formerly necessary to prove the words precisely as laid. it is now sufficient to prove the substance. Bul 5. 2 Mod 718. Esp 521. But the sense & manner must be the same. Esp 521. Bul 5. 4 Co 12. 217. 8 Co 150.

In actions of Slander in general the plaintiff after proving the words stated may give evidence of other words of a similar kind, spoken at another time, & even after a question brought: and for this reason (it is said) to be in aggravation of damages. Esp 518. Bull 10. Co. 213.

But this cannot be the principle, for 1^o words not actionable may be thus proved. 2^o words actionable (which may also be thus proved) are foundation for a distinct action 3^o words spoken after action. But may be thus proved. If the true object is to show malice. Bul 7. Esp 520 & 521. 591. If the true reason was "to be in aggravation of damages"

Private Wrongs.

Slander.

it would be more policy to give similar words in evidence, that are not in themselves actionable - yet this is often done - but from such words the Law implies no damages, therefore they cannot enhance them. And when words in themselves are actionable, are thus given in evidence, it is no bar to a subsequent action upon them. Therefore if they were, when thus given in evidence allowed to aggravate, the damages, there w^d be two recoveries upon the same right of action, viz. the first when given in evidence, & the 2^d when made the ground of a subsequent action: & an incident attending this rule is conclusive that y^e words given is not the true one, viz. that similar words spoken subsequent to the commencement of the action may be thus given in evidence; & it is an invariable rule of Law that there can be no recovery on any grounds but those which were pre-existent to y^e commencement of y^e action. The true reason then why words are thus admissible, which are not alleg^d in y^e Declaration, is that the fact may be better ascertained, of those alleg^d - being malicious or not. J.

But when words spoken at another time are given in evidence under this rule, Def^t may prove them true to rebut the inference. Esp 518. Bul 10.

Words not stat^d & spoken at a different time, are proved, they must be similar to those charge. Esp 520. - said the "same words" only - Bul 10. words similar Esp 518.

Our Ct. in Conn^t. has decided as proving like words spoken at a different time, to show malice. Kirby 151. - decided many times pro & contra.

Private Wrongs.

Slander.

The English Stat. of Simulations as to Slander is 2 years, from the time of uttering it. The Stat. extends only to actionable words. Esp 519. 1 Sid. 95.

The Court. Stat. limits the action to three years. It does not extend to words not actionable.

It was formerly necessary in this action to prove the words precisely as laid. It is sufficient now to prove the substance. The manner must be the same, the persons of pronouns must not be changed. Bull 5. 2 Rolle 718. Esp. 521. 4 T.R. 217. 8 T.R. 150.

Two persons can never join in an action of Slander. And this rule applies to all actions founded on private wrongs unless it be for some violation of a joint right. Neither can two persons be joined in this action as Df's. 2 Burr 984. Esp 504. Bull 5. 1 Com 195. Dyer 19. 4 Bac 511. 3 plv. 120. 121. Slander not being strictly a Tort, which supposes an act. Bull 5. 3 B.C. 117. vide 1 Com. ¶ To constitute a Tort some force is requisite, either actual or constructive: but none can be implied, either actual or constructive from Slander. It is therefore, tho a private wrong, no Tort. - J. -

Private Wrongs.

Slander.

11^o Slander by Writing or Libel.

As to the nature of slander by writing: 1^o Whatever words w^d be actionable if spoken, are clearly so when written. (Esp 504). 3 Bl. 126.

But written Slander is a more aggravated injury, as having a more extensive circulation & being always deliberately committed. 3 Bac 490. 3 Bl. 126.

The rule does not always hold converso. Post - Yet Estlin aff^r 514 says Slander by writing differs only from Slander by words in this, that it is delivered in writing or printing; and Blackstone says the same rule applies to both. 3 Bl. 126.

Perhaps his meaning is that words which if spoken could not be slanderous, are not Slander when written tho they may be actionable as being libellous. If this is not his meaning, the rule is incorrect.

¶ The most general definition of a Libel, is any writing of an illegal or immoral tendency. 4 Bl. 150. This definition is much too general to be adapted to the subject now under consideration, viz. a Libel as a civil injury. A more applicable definition is the following.

Definitions of a Libel.

A false malicious defamatory of a person (living or dead) made public by writing printing or other signs &c. tending to excite resentment, or to expose the object of it to odium, contempt or ridicule. 4 T. R. 128. 1 Hawk. P. C. 193. 332. 4 Bl. 150. 3 Bac 490. The definition seems chiefly to have been

Private Wrongs

Slander.

framed with reference to Libel, considered as a public offence. E.g. "Dead person" - "exciting resentment" &c. If this definition seems chiefly framed with reference to Libels as a public offence, it is not to be understood that every writing falling within it is actionable as a civil injury.

For Libel in general there are two remedies - by indictment &c. - & by action. 3 B.C. 125. 3 B.C. 492. 498.

The subject under this head is, to treat of Libel, as a civil injury: somewhat of the Law relating to Libel as a public offence, will however necessarily interpose itself.

It is laid down that the General Rules relating to oral slander apply to cases of Libel, as civil injuries. (Qu. Do the negative rules as to oral slander apply? E.g. to charge with crimes &c. Esp. 504. 3 B.C. 403. Stra 898. 3 B.C. 126. This rule must be taken with qualification, that the positive rules applying to oral slander will invariably apply to slander by Libel, yet that the positive rules applying to written slander will not invariably apply to unwritten slander. For the same words which if written will be actionable, are not invariably so when spoken.)

But nothing is construed a Libel which is necessary or the regular course of legal proceedings. E.g. in a declaration, complaint, affidavit, &c. Esp. 505. 2 B.C. 307.

An action lies not for publishing a true account of a trial in a Court of Justice, tho' the person's character is injured by it. 1 Bosc. Pul. 525. 5 Esp. 11. 110 n. 1 St. 456. 3 T.R. 293.

In a civil action, the truth of a Libel, as of a real writing, is a justification. 12 T.R. 748. 4 B.C. 150. Hob. 253. 2 W. 166. 1 St. 49. 3 B.C. 125. 6. 10. 4. R. 8. 9. Contra once 20 C. 4 B.C. 516. 3 B.C. 495. T.C.

Private Wrongs.

Stander.

Success in a criminal prosecution - the truth is not a justification. 3 Be. 125. 6. 4 St. 150. 5 Str. 498. 6 Co 125. 7 130. 150. 2. W. & A. 648. The falsity aggravates the guilt. 130. to W. & A. last. 150. None is the bad reputation of the person. Libels are justifications. 2 W. & A. 649.

of Publication. It is essential to the constitution of a Libel that it be published. But writing it, originally, seems to be sufficient. Ch. dictated by a third person. Esp 510. 2. Bull. 405. 5. Mod 163. 2. McCrall 642.

What will amount to a publication may frequently be a question. —

But merely transcribing it without showing it to any one, is not a publication. Esp 510. & Co 52. But it is evidence of a publication if the Libel be made public. See. as to 1st. rule, Salk. 419. Holt in this case in Salk. says a transcriber of a Libel is guilty of a publication. This dictum of Holt is not considered as Law.

But composing it - procuring it to be composed - reading it, after he knows the contents, delivering it to others who know the contents &c. are events to a publication in law. Now, to be wilfully or wrongfully instrumental in making it public, is, to incur the guilt of actual publication. Esp. 516; 9 Co. 59^b. 5 Co. 125^b 3 Bro. c. 497. 1 Hawk. 195.

5th. Sale of a Libel, by a bookseller or other is prima facie evidence of a wilful publication. Thus on the bookshelves 2 McCab. 644. Barnes² 306 3 M² 497. 12 Venor 229. 4 S² 370 5 T² Bur² 287. So of a Sale by Deft. here and 2 McCab. 644. [Note is prima facie evidence of a wilful publication by the Master.]

Private Wrongs.

Slander.

So of printing a Libel, it is *prima facie* evidence of wilful publication. 2 McCreedy 643. 2 Bl. R. 1038.

So sending it to the press for publication, is a publication in Law, & the person sending it, is guilty of publishing, where it is printed. Fentley. 201. Esp. 310.

Singing it in the presence of others, is a publication. Esp. 310. 5 Co 25. 3 Burr 2666.

But repeating part of a Libel in marriage, without malice has been held to be no publication. Esp. 310. 1 Moon 627. 313. 1 Hawk 196. 2 McCreedy 643.

Writing it to the person who is the object of it is sufficient publication for a public prosecution. Esp. 306. 310. 4 Bl. 160. 1 Hawk 195. 3 Bac. 497. Poph. 139. But such is not a sufficient publication for a civil action. Hob. 67. 2 Bl. 12 Co 35. 1 Mod 58.

If the letter was a friendly reprobation is it sufficient? i.e. for a public prosecution. Esp. 306. 2 W. & A. conclude it is clearly not actionable. 16.

Words actionable when Written.

Are all Libels which will support a public prosecution actionable? 3 Bl. 125. 3 Bac. 492.

Words written are many times actionable, when if spoken they w^d not be. 2 W. Bl. 532. arg. 1 W. & A. 331. 1 W. & A. 120. 2 Thom 313. 1 Mod 58. 1 W. R. 752. arg. Stra 499. 3. Bac 422.

As to words actionable, when written, & not so when spoken, there have been but few decisions; it has however been decided that if writing & publishing any thing false which makes a man odious, or ridiculous, actionable.

Private Wrongs.

Slander.

3 Bac 492. 2 Wils 403 1 Bos & Pul 331. And one of the Judges (Gould) held in that case (in Wils) that to write of a man that he was a "Rogue" or "Rascal" was sufficient.

So (according to Esp) where the writing injures the domestic peace. That is of a Family, charging a man's children with immorality or extravagance, it is actionable. Esp 505. If Esp. here confounds the public & the private right - an action will clearly lie in such case for y^e public offence, but it is also as clear that none will lie in favour of the individual for the civil injury: & this is warranted by the case from wh. Esp. has inferred his proposition. See 2 Burr 807.

Writing or printing of one that he is a "Swindler" is actionable. 1 W. 16. 748. Secus if spoken. 2 H. Bl. 531.

The [Public] offence & the [civil] injury of a Libel are considered as repeated in every stage of its circulation. Therefore y^e venue is not changed in Eng. 1 W. 16. 571. 697. 1 Wils 148.

Tho' the printing expresses only the initials or one or two letters of the name of the person w^{ch} it is intended - or forged names - it is a Libel - the manner being such that it must indubitably refer to y^e person. 3 Bac 492. 1 Hawk 199 Esp 506. 2 Atk 470.

III. Slander without words, or Libel with Writing.

E.g. Raising a Pallows before ones door hanging him in Effigy. Esp 511. 3 Co 125.

Representing one ignominiously by painting &c. 3 Bac 491. An action for this kind of Slander it is always necessary that y^e application of y^e Slander be made by innuendo & arguments.

Private Wrongs.)

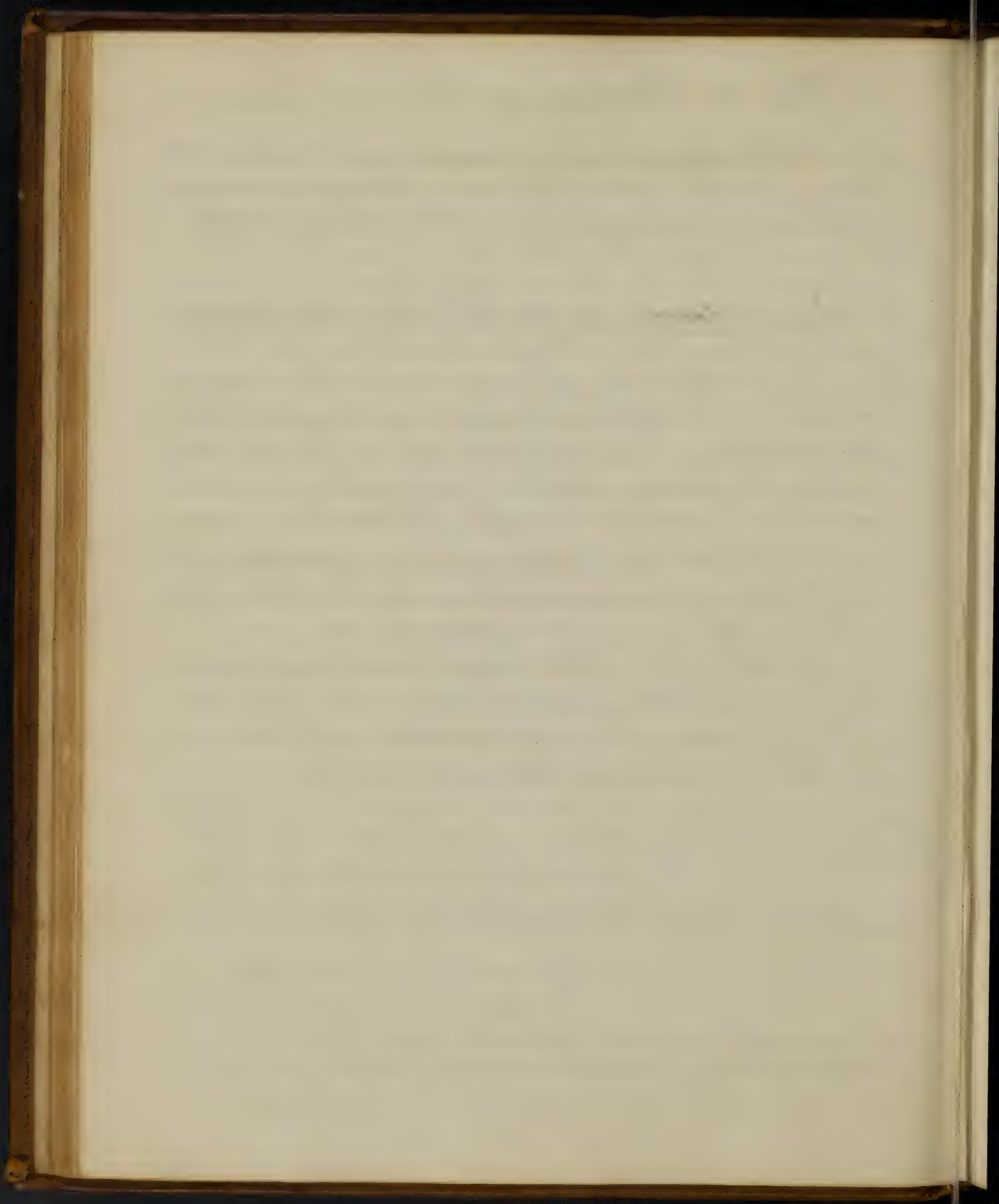
Slander.

The Special damage must always be shown. This kind of Slander is not actionable in itself. Esp. 511. 3 Bl. 125. 6. Otherwise it is not understood to be covered at y^e Staff.

Scandalum magnatum Connecticutensis.

By our Stat. Law (in Conn.) Common Slander is punishable as a public offence. Fine not exceeding \$25. to the County Treasury - never inflicted. Defaming a Cl. of Justice or any Magistrate, Judge, or Justice (respecting their judicial proceedings therein) the offender shall on due conviction be punished by fines, imprisonment, disfranchisement, or banishment, at the discretion of the Court by which the offender is convicted Stat. Con. 141.

[mem^{dm}. Connecticut Legislators have a large portion of Magistrates, Judges & Justices in their composition. who are careful never to forget that "Self preservation is the first principle of human action". J.]



Private Wrongs, The Action of Trover.

This Action originally lay only in cases where one found the goods of another, refused to deliver them on demand, and then converted them. Hence called action of Trover & conversion. And hence the argument that the goods came into the plaintiff's possession by finding. 3 B.C. 152. 5 Bae 256.

It now lies in many other cases than for goods found. The action is derived from the Stat. Westminster 2. 13 Edw. I. being unknown to the Com. Law. 7. 31 Years Hist. C. 2. 58. 2 Ibid. 202. 3. 89. 243. 391.

It now lies by fiction as one who tortiously takes the goods of another. 5 Bae 257. Pro 8. 824 Pro 1. 50. This is as as doubted. Esp. 589. 1 Mod 31. Stra 127. It was doubted so late as the reign of James 1st. — The fiction is that the plaintiff lawfully into the possession of the goods by finding & then converted them to his own use. And it is sufficient for the Plaintiff to prove the tortious taking. In these cases the issue of trespass is concurrent with Trover.

And this action lies in all cases in which one who is by any means possessed of another's personal goods, sells them, destroys them, or uses them without consent or right, or wrongfully refuses to restore them on demand. 3 B.C. 153. Bull 33. Gra E. 781. 5 Bae 256. 7.

The first instance of this action in its present form was in the reign of Edward 6th. But actions of a similar nature had been brought in the reign of Henry VIII. 4 Reue H. E. L. 526. 385. 386.

The fact of finding is now in materials. Conversion

Private Wrongs.

trover.

is the gist of the Action. 'Finding' is generally stated in Eng^d & now that the goods came into D^f's possession by 'finding'. But it is not always stated in Eng^d or Conn. Esp 587. Bull 33. 5 Bac 273. 2 Bulst. 310. ¶ nor is it indispensably necessary, it is sufficient if he states that they came lawfully into D^f's hands. ¶ The manner of obtaining possession is but inducement. Esp 587. Bull 33. "finding" is not traversable.

Trover has superseded detinue, by the law certainly requires in describing, & freedom from a plea of Dan. 3 Bulst 33.

OF CONVERSION. The general definition of a conversion is, a wrongful assuming to dispose of goods of another as if they were one's own. 5 Bac 257. 6 Mod 212. 2 Bulst. 280. 10 Vin 264.

The defense by fiction is always supposed to have gained possession lawfully - But the action lies as well for a trespass where the original possession was tortious as where lawful the gist being conversion. 5 Bac 256. 7. Lord 50. 11 Vin 31. And this may consist either 1st. in an unlawful taking. 2^d. In an unlawful use, 3^d. In an unlawful detainer. The evidence of conversion in these cases is different. There must be a misfeasance to constitute a conversion. Esp 570. 5 Bac 257. 268. 269. Path 655. 1 Roce 6. ¶ A mere nonfeasance never amounts to a conversion, but it may be evidence of it as a denial or refusal to restore. ¶

1st. A tortious taking is itself a conversion in Dan. Esp 589. 5 Bac 257. 1 P. 264. 2 At. R. 465. ¶ An example usually given is that of an officer carrying on goods not attachable, he in such cases is liable in Trover, & it is sufficient to prove prop. & unlawful taking. No demand nor any thing of the kind necessary. Esp 580. 3 Bulst 146.

In such cases trover is concurrent with trespass. 5 Bur 265.
2 Stra. 443.

III. In an unlawful user. This supposes that the possession was lawful. e.g. using a thing found, bailor see 5 Bac 257. 1 Com 22 or 221. Ch. E. 219. This is "assuming to dispose of the goods of another as if they were his own". 5 Bac 257. Where the taking is not larcinious there must be some evidence of an actual conversion, as in the last of following examples. Co. p. 580.

Misusing a thing entrusted to one's care, found. is an unlawful user; & so a conversion. 1 Com. 221. A carrier of a box of goods, breaks it open, or sells it. 2 Talk 655. 2 Buls 312. 2 St. 18. 753.

So throwing paper found into the water. Co. E. 219. 3 Bl. 153.

If Bailor of goods destroy them, trespass, it is said, is concurrent with trover. Co. Lid 57. 5 Co. 13. 2 How 555. 5 Com 381. 2 Moor 243. The Bailment is extinguished. See Title "Bailment" page.

Drawing part of a cask of wine, & filling it with water is a conversion of the whole. Co. p. 581. 1 Com 221. 5 Bur 576. This is a wrongful assuming to dispose of goods of another as if they were his own.

But negligent custody of a thing is not unlawful user. Co. p. 580. 580. it is not a misfeasance wh. I have remarked above is necessary to constitute a conversion. So there is no conversion. e.g. a finder of cloth suffers it to be moth eaten. Hob. 251. 8 Co. 146. 10 Mod 68. 2 Ray 917.

So if perishable articles are suffered to be spoiled.

Private Wrongs

Trover

for want of care. 60 C. 2. 14. 5. 11 C. 2. 904. 1 Roll 6. C. 5. 3. 1200.
2827. 1 Bag 48. 1 Pan C. 252. 5 1200 253. 1 Roll 17. Salt 555. 143.
1 Roll 2. 1 1200 243. 5 1200 264.

A special action on the case lies in the case of
 the finder, supra. Exp 590. Salt 555. 12. 117. 1200. 252.
Jones v B. 42. The 100000. Common carrier. Salt 555. 12. 117.

If a carrier of goods lose them, Trover lies not.
Salt 555. 143 & auth. supra. If it is a mere nonfeasance
 therefore no conversion - he is not liable in Trover -
 But the bailor of goods may have his remedy by a
 special action on the case according to the custom of
 the Realm.

If unlawful use consists in selling the property,
Indebitatus assumpsit is concurrent. 1200 121. 1200 119.
1200 144. 1200 119. 6 1200 119. to recover the money sold for
 money his price. In the action of Indeb. Assumpsit
 the vendor is considered a trustee for the owner, of the price
 of the goods sold. Which price is recovered by the plaintiff in
 the action of Trover the value of the goods sold is the
 rule of damages, consequently the owner of the goods
 may by changing his action, recover at his choice the
 price of the goods sold, or their value not regard-
 ing the price.

The Unlawful detainer is a conversion. As if
 the possessor wrongfully refuses to deliver on demand. If indeed
 there has been an actual conversion, as by using, de-
 stroying, selling &c a demand or refusal are not necessary
 to the right of action though the possession was lawful.
Exp 589. 590. 1200 264.

Private Wrongs.

Thro. 11. 3

But a refusal to deliver on demand is not itself a conversion, or unlawful detainer, for it may be justifiable, as e.g. not sufficient evidence of ownership accompanying the demand. Esp 590. 2 Buls 312. Coups 529. So the Deft. may have had a lien on the property, as an Innkeeper, a carrier &c. 2 Show 161. 2 L. Ray? 752. Esp 582. 2 Bur 936. 4 Bur. 2221. - So it may have been destroyed without the Df's fault, or lost or stolen, ut supra. Walk 655. Esp. 590. 5 Bur. 2827. L. Ray? 752. -

A Demand & Refusal therefore are only evidence of a conversion or unlawful detainer. Esp 590. 1 Roll 131. 5. C. 50. 3132. 153. Hob. 187. 2 Show. 179. And only prima facie evidence. 10 Co. 55. 57. Esp 590. 3 Bur. 1243. 2 H. Bl. 135. 136. This is denied in 6. Mod 112. Moore 460. & said to be a conversion. But on Coups. 529. [The proposition is however unquestionably true.]

Hence if the jury find only demand & refusal, the Ct. cannot decide for Plff. Esp 590. 10 Co 56. Pro 6. 97. 415. Head 48. 3 Bur 1243. [For 2^d fact of conversion is still to be found.]

It is a rule of C. Law that a finder of goods has no lien on them for his expense & trouble. - He cannot justify a detainer. 2 H. Bl. 254. 2 Bl. R. 117.

If one having goods of another, puts them into y^e hands of a 3^d person wth y^e command of the owner this is conversion. Esp 581. 42. 10. 260. A servant is liable for a conversion by himself, tho' to the use of his master & even by the masters order. Esp 580. 6. 12 Wils 328. 1 Stra. 813. 1 Com 221. 5 de. Bull. 4. 7 quid vide - 2 Mod 242

A's Timber being on B's Land, A. asked leave to take it; B. refused. B. was holden not guilty of a conversion. - There was no intermeddling nor misfeasance. 5 Bac. 259. 29. 2 Buls 310. 2 Mod 245. 6 Bac 178. 4. 2 H. Bl. 257. 8.

(Whom may maintain Trever.)

If goods are sent by A to B. not to rest in B. but in order to answer a particular purpose for A. which cannot be answered, A may recover for them after *Don. an. s. 5 T. R. 215. 495.*

Suppose A finds the goods of B. B. claims them; sues A on refusal to deliver, and recovers y^e value. B. then sues & proves his property. Can B. recover? If it has been decided in *Comm.* that B. c^d recover, & A was obliged to pay y^e value of the goods the second time. There is no decision to be found in y^e English Books, but Mr. Gould thinks this decision in *Comm.* is incorrect. Some body must suffer, either A y^e finder or B y^e owner; it is not likely that a remedy can be had for B. - we take this for granted, & he thinks the law ought to fall on B. on principle of justice y^e finder having acted with honesty. Many cases, having done a neighbourly act & refused to deliver them to C. the payment not being voluntary, but by compulsion proper of Law, he ought not to be compelled to pay y^e value of y^e goods y^e second time. And it is a rule that, when y^e Law compels a person to pay money over to another, he cannot be subjected to pay it again tho' the person to whom it was paid had no right to it. If A has paid it voluntarily to C. undoubtedly he w^d be liable to B. But that is not so here. See *Tell. Bailments* Sect. 3. *J. An analogous case* may be adduced, 3 T. R. 125. 2 Bac. 11. 1 H. Bl. 689. 682 and 2 Dall. 54. I will mention one - if administration is granted to a wrong person, the goods or debts of y^e estate due to y^e estate, & after this y^e letters of administration are repealed, & admⁿ granted anew to y^e rightful person, this right just action cannot compel the debtors to pay a second time, because they had once paid their debts to a person having authority by Law to demand them. See 2 more analogies in *Tell. Bailment. Supra.*

Private Wrongs: 3

Wrover: 3

It is not necessary for y^e plff. to have had the absolute ownership of the thing. E.g. a Bailor may maintain the action vs a 3^d person. He having y^e General property (See the Bail.) 5 Bac. 281 2 Koss 589. 1 Sid 438. Latoh 214.

As a Bailor having Special property, may perhaps in all cases maintain y^e action vs a Stranger. 11 Mod 121. 44 (P. 140) 3 Wils 140. 1 Com. 218. 1 Koss 4. l. 52. As a common carrier a Special Carrier. Register 1^o 5 Bac 165. 282. Moon 545. Lat. 143. Esp 577. 1 Mod 21.

So a Sheriff who has taken goods in execution, may maintain it. 1 Lev. 282. Bull 33. 2 Sand 47. St.

So if you find a house blown down may have trover for y^e timber vs. a Stranger who carries it away. He has y^e Special property. Bull 33. Esp 577.

So possession alone gives a right to maintain y^e action vs all but y^e owner. E.g. when one finds goods. Esp 575. 1 Com 219. Stra 277. 505. Bull 33. This gives him a kind of property, which will support this action vs third persons. 2 Sand 47. St. 208. 319. S.C. - 5 Co 24. 3 Wils 332.

But y^e possession must be acquired either legally or under claim & colour of right. - for if gained without colour of right it gives no Special property vs. Strangers. 3 Wils 338. 2 Sand 47. St.

So a right of possession is sufficient. As where Dep. having goods of J. S. is obliged to deliver them to plff. J. S. creditor - action. Lay. Esp 576. 1 Buls 68. 1 Com 219. 1 Bac 242. 1 Koss 606. 7 T. R. 9. 1 St. 482. The plff. never had possⁿ. 2 Sand 47. 1^o mod.

But a property of some kind is necessary. For where plff. had sent an order for goods, to be delivered to his servant, & y^e tradesman delivers them to y^e servants host - action.

Private Writings.

Nov. 23

Can not say: has, in favor of the purchaser, for no prop-
erty in him for want of delivery. Salk 18. 3 P. Wms 186. Esp 576.
Bull 35. b. - Decis if they had been delivered to y^e Servant
of the p^roff. Bull 35.

An unauthenticated Bankrupt may maintain this ac-
tion as a stranger. 1 Bos & P. 44. Peake 140. 3 Esp 12. 140. Cowp 589.

Formerly at Com. Law of an Estate or Adm^r. - not main-
tain y^e action, for conversion in the Testator's or intestate's
life time. - Now he may by y^e Equity of y^e Stat. 4 Ed 3 (2 Bac 439)
de asportat. &c. I suppose. Esp 572. 1 Com 219. Co E. 377. Esp 589
Stra 60. 2 Mod 158.

Held that an avowment of Conversion in intestates
life time, is supported by proof of taking in his life time &
using afterwards. 1 Com 221. Esp 589. Stra 60. - (for y^e time of
using lay in y^e knowledge of y^e Def^r - what then? - was
not the taking tortious. vide Esp 572. 1 Wms 280. The Court
considered y^e conversion complete in intestates lifetime.

The Bailor right is to be founded on his own liability to
y^e Bailor, i.e. (if so at all) it concerns on y^e propriety of his be-
ing liable. - other always exists. 1 Bac 242. 13 Co 69. T. R. B. 89. 92
5 Bac 164. 6. 262. Co Lit 59. 1 Sid 433. (Special property.)

Now this in the case of depositary. 5 Bac 165. p. 22. Bond
y^e Special prop^y. sufficient which he has? Jones B. 112. Case of
finder Supra, "possession only" held on sufficient. Decides he
may be liable. No bailor liable in all events. Policy re-
quires it sometimes. See Bailments.

If one delivers to A. y^e goods of J. S. the Bailor by deliv-
ering them back to y^e Bailor exonerates himself from
J. S. claim - as such delivery is effectual to bar an action

Private Wrongs.

Prover.

by J. L. even if y^e delivery back is pending this action. 1 Bac. 237. 242. 1202. 606. 7. T. M. B. 137. see Bail. - (Suppose y^e party knowing the prop^y. to be J. L. has refused to deliver to him, is not this evidence of an unlawful detainer?)

Recovery by bailor ousts the Bailor of his action for the full value. & vice versa. 13 Co 69. 5 Co 161. 163. 11. 1202. 589. see Bailor out.

So Bailor by suing the wrong doer first, ousts y^e Bailor of his action. & commencing y^e action attaches a right of recovery. So if Bailor sues first, Bailor is ousted of his action of trover for y^e full value, but he may have an action for his special damages. See "Bailment."

There are no direct decisions to this point but it is supported by analogies. as e.g. in an appeal of robbery by master & servant. 3 Bac. 589. 127. (see Bail). So also if a Creditor has commenced an action vs a Th^{ft}. for an escape, y^e Prisoner returns the action is not to be barred but y^e Creditor may proceed to judgment. vs y^e Th^{ft}. 4 Co 44. 52. 2 T. M. B. 137. 138. 139.

Bailor by suing y^e wrong doer discharges y^e Bailor. He elects his remedy. I conceive says Mr Gould, see Bailment page 109. "who there are no authorities that this is correct, I judge" "Neville is of y^e same opinion. It is a correct proposition if the other rule is true, viz. that Bailor by first commencing his action vs y^e wrong doer ousts y^e bailor of his action; and this I take to be correct. And there is an analogy between this case & a case where an action is brought vs a rescuer: If an action is brought vs a rescuer, to prevent "says" y^e party waives his remedy vs y^e Th^{ft}. & the same is y^e same in this case."

on the other hand if y^e Bailor was first to make

Private Property.

Private Property.

must be liable to y^e bailor, & for says Mr. J. on Se. Bailments: "he then takes away y^e bailor's remedy as y^e wrongdoer." This rule is correct if the last one is. If that is incorrect, so is this - this being merely a corollary of that J.

In 13 C. 60 it is said that he who has the special property shall have trespass on this action (trover) as him who has y^e general property. on Bailments. 7 T. R. 12. And that y^e possession of y^e self, may go in mitigation of damages, but conversion says Mr. Gould (on Bailment) that whenever anything goes in mitigation of damages, when y^e right of action accrued there must have been a right of action to recover for y^e whole, but here he has not a right of action to recover y^e whole. J. Studge River in his Lectures lays down a different rule, that the Bailor may have a special action on the case to recover special damages. 5 B. & C. 266. Bailment. But who may he have trespass on Trover 18 y^e bailor. The action is not for the loss of property, but for y^e use of it of the special interest. The value of the property is not even prima facie y^e rule of damages.

Returning y^e goods after conversion, to the owner does not oust his right of recovery - it mitigates the damages only.

10 p. 581. 5 B. & C. 266. 6 Ch. 217. C. 148. 11 C. 221. 11 C. 5. C. 40. 2 B. & C. 202. 6 T. R. 696.

But when y^e conversion consists in a tortious taking, if the defendant delivers it, on demand, no damages can be recovered for the taking, that is waived in this action. 1 Burr. 31.

A recovery in Trover vests the property converted, in the plaintiff, until when it has been returned before verdict. 10 p. 593. 1 C. 142. 5 B. & C. 1072. 5 B. & C. 257. A former money is a stranger, is a good plea to y^e action. 10 p. 593. 1 C. 142. There can be but one recovery. 10 p. 593. 1 C. 142.

Private Wrongs

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So a recovery in *indebitatus assumpsit* the property having been sold is a bar. 5 Bosc 280. 2. King 1217.

So in *trespass* when conversion is proved. If *assumpsit* has had a recovery in any concurrent action it is a bar to this. If *assumpsit* is pleaded the former recovery, he must show specially if it were by the action of *trespass*, that it was for the identical wrong laid in the present action, as a conversion: or if it were by the action of *indebitatus assumpsit*, that the promise grew out of the same conversion which is the gist of the present action; but it seems that the former recovery may in Eng. be admitted in evidence under a *General Issue*. 2. Ray 1217. 10p 593. f.

Against whom Trover will lie.

It will lie vs a wrongful Taker, as vs a Bailee, who unlawfully uses or detains his Bailor's goods, or against a finder of goods who does not restore them to the owner on demand, & satisfactory evidence of ownership. For the recovery of the owner who delivers his goods over to a 3^d person.

And it is a general rule: that if owner of property, man in Eng. maintain Trover, not only vs his first, but any subsequent holder, even a bona fide purchaser (Stra 1187) e.g. Bailee or finder of goods. 12 C 188. 10p 579. 12 C 280. 12 C 158. 11 Bosc 237. 5 Bosc 250. 250. Provided the sale was not in Market overt. But yet it will lie if the sale in Market overt was by Covin. 2 Bosc 450. 10p 579. 12 C 158.

There is an Exception to the Eng. rule above, so far as relates to others than first takers, in case of money. Bills of Exchange. Trover for them can only be had by the

Private Wrongs.

1000.

first taken, by reason of their currency, when they have been paid over to a third person on a bona fide consideration.

Reason of Policy. 1550. 452. 457. 1. Salk 126. 1. S. Ray. 738.

Case is *Burns* of a banknote stolen. Spaid away for valuable consideration. Esp. 39. 530. 3. Bur 1516. 1. H. 12. 455. Doug 611.

For what Trece lies.

It lies for personal chattels in general. This action lies for choses in action of any kind, tho' only evidences of property. & the date need not be alleged. *Core* 190. 1. 162. 1. 262. Esp 543. 558. 1550. 219. *Core* 1. 637. 1. *Core* 5. 120. 1. *Core* 1. 125. *Core* 117. Salk 130. 283. 634. 2. S. R. 708. For accurate description of it is not required because, if shown in action is supposed to be a bill, & if false, but if he attempts to be exact in the date of it & if from it, unless he is so, he will fail in his action. *See* *Core* 723 that it lies not.

This action also lies for title deeds. Esp. 543. 9. *Mod* 2. S. R. 708.

It lies not in general for an Animal free natured. But if confined & valuable, 4. H. 235. tho' for such unclaimed animals it does. e.g. *See* *Hawk*. 1. *Core* 219. 1. *Hell* 5. 4. H. 235. 5. *Bac* 263. 1. 4. H. 86. *Hob* 283. *Core* 8. 125.

It lies for tame animals, as Dogs. *Hob* 283. also in some tho' not unclaimed being merchandise & valuable. e.g. *See* *Key*, *Panther* &c. *Core* 1. 262. 5. *Bac* 264. 1. *Core* 219.

It lies not for a Negro Slave in Eng^d or Conn^t. 5. *Bac* 263. 1. 146. *Core* 347. 1. *Core* 1274. 3. *Core* 336. 2. *Core* 201. *Core* 1. *See* 3. *Hell* 785.

It lies not for a copy of a Record, because it is not private property, & public things. It does lie for a copy of a will, tho' being considered private property. 5. *Bac* 264. *Core* 111. 15. 541.

It has been held that it lies not for money.

Private Writings

Nov. 3

unless in a Bag &c. that it might be identified, as in & a
miser. Cr E. 638. 661. L.C.

In like cases it is holden, that as y^r. object is not to
recover in species, but damages only, it does lie for money
not thus circumstances. 5 Bac 264. 1 Com 219. 1 Kees & L 15. 10.
Cro Car. 896. 1st Ed. 7. Cro E. 818. 841.

If a Horse (or other) loses her Husband's money at play,
Money lies by y^r. Husband. 5 Bac 264. 1st Ed 122. Bull 33.

When goods are pawned, y^r. pawnor may maintain tre-
sor after tender of y^r. money. 5 Bac 264. Cro E. 244 Esp 590. Bull 72.
4 Co 83. 2 Kay. 716. Bull 522. 1 Com 220. 4 Com 258. see "tailor".

If pawned on an usurious contract, y^r. pawnor cannot
maintain trover, till he has tendered y^r. money advanced
& semb. y^r. interest. 1st K. 153. The action being not to enforce
but to be relieved against the Contract. Trov is an equi-
table action. J. P. must therefore come into Ct. with
Equity on his side; & for this reason it seems that not on-
ly the principal but y^r. interest sh^d. be tendered, as in jus-
tice so much is due y^r. Debt. - and it seems that until he
has done so, he cannot support this action, tho' y^r. whole
contract. If y^r. payment & the pledge is strictly void.

A parol gift of goods without some act of delivery
does not transfer y^r. property of Goods, & y^r. action will lie
in such case as donee, he having taken possession.
Esp 577. 1 Bac 239. 2. S. on 30. 31. Qu. without demurrer
would not y^r. gift be parol be a license?

But delivering the Key of the Room where the Goods
are kept to donee, is sufficient. 2. Stra 956. 1 East 192.

Sept. Blank this inside,

Trivial Things

Prover.

One Tenant in Common or joint tenant of a Chattel, cannot maintain this action vs his companions - where age may be taken of it as "not Guilty". Comp 450 12 ay 201. Esp 586. Salk 240. 5 Bac 280 10 R. 658. Jans. need not be, & ad in abatement of The possession of one, is y^e possession of both secus if it be destroyed. Esp 586. Co 200. 200. 1 East 363. 368.

1 Bull 34. 39. If lost by one only vs a stranger, plea is abatement. i.e. advantage must be taken of y^e non-juror I suppose by plea in Abatement. T. R. Salk 290. 2 Per. 113.

Co E 544. Esp 411. Litt. § 323. Salk 4. Stra 820. Comp 460.

The action being for conversion of personal property only, carrying a thing from another's custody is not a conversion (5 Bac. 257.) as taking a door from its place carrying it away. Co 129. But if the convert is "possessed as of his own goods," severance is presumed after verdict. Co 129.

But tortiously taking a thing already severed is a conversion. 1 Boy 125. 5 Bac 257.

Throwing goods overboard to save a Ship is no conversion. 5 Bac 258. 2 Bull 280.

The Declaration must state a place, or it is in substance substance Esp 588. Cro E. 78. An. 20 R. 30. The omission of stating the place where it is cured to verdict, sem 6.

The Declaration in Trover ought to show property, in pl^{ty} but stating possession "as of his own goods," is sufficient. Moore 691. Hard III. Com 222. 5 Bac 271. See vide 2 Sand 379. - Stra 1023. Denial and refusal not necessary to state.

The time of conversion must be averred. In one case for y^e omission judg^t was averred. Esp 588. 1 Vent. 135. Co 1428. 1 Com 224. Cro E. 97. When the time of conversion was said

by the y^e owner. the 'afterwards converts' was held sufficient to the
 said void. Du. as to y^e award of judg^r: 3 B.C. 394. Calk 389. Cro. J. 428.
 5 B. ac. 316. If the omitting to state the time (scilicet) is cured by verdict
 the contrary is held in 1201 135. Proof of a conversion on any
 other day than that stated will sufficiently support y^e declaration,
 if it be not run upon by y^e Stat. Limitations. f.

The thing must be described with convenient certainty, former-
 ly it must have been described with great accuracy. "Divers Books"
 insufficient. 1 Vent. 114. 317. 1 Rev. 301. Esp 587. 8 L. Ray^r 588. 2 Lev. 176.
 2 Ray^r 99 or 999. Bull 37. Sta 459. As to y^e necessity of alleging
 the value of y^e goods, 5 B. ac. 275. Cro. J. 130. 147. 8. "price & value"
 3 N. B. 88. The value need not be stated according to Esp 588. Cro.
 Jac 148. Du. Esp 407. 2 Lev. 430. 5 B. ac. 275. // falsely laid down in Esp //

It is said that there are only two good pleas in trover, General issue
 & release. Esp 592. 1 K. b. 305. 5 B. ac. 276. // Because that any other facts than
 a release, or some other subsequent thing operating as a discharge,
 will amount to y^e Gen. issue, the specially pleaded & because any special
 plea must admit y^e fact of a conversion, & that being a tort of dan-
 imposting an act, per se, wrongful, can never be justified. Yet not
 withstanding this technical propriety of y^e rule, it is not attended to in
 practice, for many pleas have been allowed. Yelv. 198. 1 Show 146. Cro.
 J. 73. Sta 1078. Salk 654. vide Sta 60

But a justification may be given in evidence under the
 Gen. issue. Esp 503 or 543 or 593 Bull 48 // any thing but a release may
 be given in evidence under y^e Gen. issue. Practice in Conn. 2. Stat.
 Limitations in Conn. does not run vs. Trower even when concu-
 rent with Stat. 8. so decided by y^e Sup. Ct. Du. // 3 y^e decision
 founded on principle f.

Private Wrongs

Action of Assault & Battery. By Mr. Sedgwick.

An assault is an attempt or offer to do a corporal hurt to another, by force, without touching. e.g. lifting a weapon or fist in a threatening manner. 11 Bac 154. 3 B & C 120. Esp 312. Bull 15. So presenting a gun, drawing or waving a sword, pointing a pitchfork &c at one within the reach of it. 2 Roll 545. 1 Com 553. 1 Hawk 133. Any unlawful striking upon the person &c by an offer &c to beat (Foster 202). This is an inchoate violence & amounts to an injury; 3 B & C 120. 3 Kier's H. C. L. 85. tho' no actual damage.

But a gesture, otherwise amounting to an assault, may be explained by words, so as to fall short of an assault. 11 Bac 154. e.g. A lays his hand on his sword & says, "if it were not a prize time," &c. tho' the intention must operate with the act, to constitute an assault. 1 Mod 3. Esp 312. 10 Mo 137. 2 Roll 545. Words alone then cannot amount to an assault. ancient opinions contra. 11 Bac 154. 1 Hawk 134. 133. 2 Roll 545. 1 Com 590. (But threats of bodily hurt, producing actual inconvenience is an injury. e.g. interrupting one's business. 3 B & C 120. Remedy Trespass. post.)

Battery consists in the actual commission of violence upon the person of another. Esp 312. The least degree of it done in an angry, spiteful, insolent, or rude manner is a battery. 11 Bac 154. 6 Mod 149. 172. 1 Com 589. 1 Hawk 134. e.g. Spitting in the face, treading on the toe. "The unlawful beating of another." 3 B & C 120. Qu. Is a battery of course unlawful? or it may be justified. 3 B & C 120. Tal. 107. p. 109. says Blackstone's definition is correct in all cases. It may be justified. T. 17.

Pirate Murders.

Assault & Battery.

Being battery includes an assault. But the rule does not hold & converse of proof of battery will therefore support a charge of assault battery. 1 Mac 154 17 Bank 134. Sal. 384.

Menaces of bodily hurt, tho' not amounting to an assault. for words alone cannot constitute an assault. are in some cases actionable injuries. when they occasion an inconvenience they are actionable, otherwise not. 3 Bl 120. Finch 202. 1 term 390. 1. 2 Roll 545. The action is trespass vi et armis. 3 Bl 120. 2 Roll 545. for the immediate violence.

In battery, the injury must be immediate. But not necessary to battery that the injury sh. be y^e instantaneous effect of the act of the wrongdoer. Sufficient if produced by a connected train of effects. In general any wanton act, by which one causes a battery, supports the action. 2 term 295. e.g. R. vs. Chas. a Squib into the market place which eventually put out J. P.'s eye. 3 Wils 402. 2 Bl. 1189. 2 term 634.

The particular distinctions between trespass & assault. Both trespass on y^e case

So if one pushes another wantonly or carelessly & the latter falls against a third, the action lies against y^e first. 1 term 312. 1 term 16.

A Horse taking sudden fright runs against a person the rider not liable not his act. But if a third person struck the horse, he would be liable for all consequential injury. 1 term 312. 4 term 400. 2 term 100. 1 term 24. 1 term 589. But 587. 1 term 16 that he is liable on an action on the case. 2 term 637. argues and says trespass on the case.

When a person receives bodily hurt, from an act, to

Private Wrongs.

Assault & Battery.

which he consents. he may sometimes have an action for others, it is said not. Esp 313. Note: If the act consented to, was legal, he has no remedy. E.g. Hurt by playing at cards, no action - it promotes courage. 1 Mac 154. If hurt by boxing, consents to, he has action, for boxing is unlawful, 4 Bull 16. 2 Lev. 174. & consent C. not make it lawful. & volenti non fit injuria does not apply. Consent void. Dev. are not both particeps criminis?

So consenting to be beaten, does not justify the beating. Esp 313. Comb. 218. Bull 17. Dev. in the civil action?

But that the injury happened in an amicable contest as wrestling, is a good excuse. Consent good. Law on Pl. 125.

If one in defending himself accidentally hurts another before him, he is liable to this action. 2 R. R. 896. 5 R. R. 488.

Malicious intent is clearly not necessary to subject to the action of Trespass if it comes. For a Liberator is liable to it, civiliter, Latoh 13. 110. Dong 640. Esp 399. Hob 134. The not criminality? 1 Bond 81. It is a general rule that in case arising ex delicto, innocence of intention & cause. Dong 649. not universal 1 Com 204 Bro 119.

But how far accident will excuse an involuntary trespass, has been a Que. of some difficulty. According to Finch it is sufficient to make one liable if he has been "the physical cause of damage" 1 Bond 81. This is too broad a rule. For it will not admit of even inevitable accident as an excuse. If the injury happens by the fault of the party, injury excused. Hob 134.

It is said that "inevitable accident, or inevitable necessity, shall excuse. Hob 134. 1 Com 589. 2 R. R. 542. 3 W. 4377 2 R. R. 594. 3 Le 410. 1 Stra 596. 1 Bond 81.

Meaning of inevitable what? That the accident should be physically unavoidable? [If so the case in *Boat. 10* seems not to be *Law*, where a distinction is taken between want only pushing a drunken man against another, & attempting to assist him, for in the latter case the accident is not physically unavoidable.] And in *Boat. 104* the Ct. tho' they use the word "inevitable," argue on 7th ground of neglect. *Boat. 134. 3. 6p. 313. 383.* Excused if "utterly without his fault." *Boat. 134.*

Buller (N.P. 116) supposes that if a horse used to run away with the rider, takes a fright, & in running injures another, the rider is to be liable on the ground of neglect. And yet the immediate injury would seem as physically inevitable, as if the horse were not addicted to running away. But here the remedy would be easier for neglect, not the ridersuit, *1 Vent. 248.* Most of the examples given suppose some neglect, as the case put of cutting a hedge of thorns, which fell on J's land, there was neglect. *T. 11 May? 467.* So in the case of clipping loughs. So, case of cocking the gun. *Stea. 576. 4. 1 Burr 2092. 6p. 383.* So where A's timber floats on B's land. *2 H. 182. 257. 8.* "Action on the case."

"Rule is clearly, that where the injury is inevitable & no fault is excused. *Boat. 134. 2. 130. 10. 896. 1. 3. 11th 377.* e.g. one catches with the apple of falls against another. (The injury can't be said to be inevitable, where the act causing it is voluntary, i.e. where the act is not the effect of the cause above & equals control. But still there is no liability if the party injured is himself the faulty cause. *Boat. Page.*)

Private Wrongs. 3. Assault & Battery.

In other cases, according to some opinions, if the act causing the damage is lawful, the agent guilty of no neglect, no want of care, is excused. (Esp 549. Bul. 15. 16. Esp 317. 318. (E.g. Helping a drunken man as put in Bull. N.P. 16. 17.) & Mac 168. Sid. 200. The latter opinion seems to be, the injury must be inevitable, without fault.)

In the case in 4 Burr. 2092. (Case of a Deer killed by D. of the B. of the B. w. not be considered as the agent, nor the act his, unless the injury was voluntary on his part.) [When the injury is wilful, the author of it is undoubtedly liable.]

But where the act causing the damage is unlawful, the author is in some way either in trespass or case liable at all events, whether there is the least neglect or not, for the consequences, immediate or mediate. (1 Bul. 11. 893. 2 Harg. 157. 480. 12 Mod. 639. Wint 295.)

The above rules, as to accident &c. apply to trespasses in general.

The Defences to this Action.

¶ To the action of Trespass vi et armis for Assault & Battery there are three kinds of Defences. Denial or Infirmitation which is a denial of the fact. Excuse which admits the fact, but pleads it was owing to inevitable accident. This may all be given in evidence under the general issue. Pardon Justification, which is the insisting upon something which made it lawful for the Defe. to commit the battery. A defence of this kind is usually "son assault demourne" Bull. 17.

Assault & Battery are justifiable in many cases. 1 Com. 589. 3 B.C. 120. E.g.

Private Wrongs.

Assault & Battery.

E.g. An officer having legal process to arrest one may use violence in case of opposition, so far as is necessary to effect the arrest. Esp 314. 11 Bac 155. 1 Hawk C. 6. 130.

But a battery is not justifiable in this case unless there is actual resistance. 2. Ray. 224. or an attempt to resist. 2 Stra 1049. Bull 18. 19. To 314. 3 Sa. 403. Cro E. 43. & an arrest simply will justify an assault only.

But a molliter manus impositus in making the arrest, is justified, tho no resistance &c. 2 Stra 1049. 2 Hall 546. 11 Bac 156. Bull 19. 5 Com 355.

Plea of "molliter manus" &c goes to the justification of the battery as well as of the assault. 5 Com 355. Skin 387. Cro E. 93. 4. 2 Wm C. 193. Con. 3 Sa. 404. Esp 314 but not of bruising & wounding &c. 8 H. 12. 299.

Battery is justifiable on the ground of self defence. 3 Bl. 120. As if one strikes me first, I may strike him. So an assault by plff. is sufficient to justify a battery by deft. As if plff. lifts a weapon &c. 1 Com 589. Bul. 17. 18. Esp 315.) Plea, "for assault" &c.

But there must be some proportion between an assault & battery by plff. & that by deft. For every assault &c. how ever small, will not justify every battery however great. Hall 1043. Bul 18. and the proportion is a Qu. of reason. A small blow will not justify a mayhem. If plff. strikes deft. a scuffle immediately ensues. If plff. is mayhemed, deft. is justified. Hal. 642. Sid 246. Esp 315. Secus if plff. gives a slight blow & deft. in return strikes so as to mayhem.

The plea in this case is "for assault & battery," &c.

that first assault proceeds from self. & that Defe. stands in self defence. *Wendons* 447. *Exp* 315. *Sul* 642. (but may here it seems is not justified by self's aggression, unless self's act might endanger Defe's life. *L. Ray*? 177. *Exp* 315. *Sul* 642. *Wendons* 430. *member*? *1 Com* 290.

Note the replication *de injuria*. *1: see* *1 Bos* *Mil* 76. & *Cobb*.

If self was the blameable cause of the battery (tho he did not strike or threaten to strike) Defe is justified in some cases. As when self tilted the seat on which Defe was sitting, & Defe hit off self's finger. *1: L. Ray*? 177. *Sul* 642. *Wendons* in this case seems to have been justified by self's attempting to gouge Defe. according to *Wendons* 43. *L. Ray*? 177.

So when self thrust his money into Defe's heap, & a scuffle ensued. Defe justified. *Exp* 315. *Cro* *J* 366.

Parents justifiable in giving children reasonable correction - master his servant - Schoolmaster his scholar - gaoler his prisoner. *Exp* 315. *1 Sid* 176. 7. *1 Hawk* 120 *Bull* 18. [Such are not liable for the battery (if reasonable) for the relationship constitutes a justification.]

So according to some, a husband and his wife. *1 Hawk* 130. *1 Keb* 130. *1 Mac* 155. These relations constitute special justifications.

A man may justify a battery in defence of his wife & converse. So of parent & child. *Exp* 314. *Bull* 18. *L. Ray*? 62. Clearly a servant may justify in defence of his master. *Wendons* & converse *Qu. 2 Mac* 568. *Exp* 314. *Bull* 18. 19. *L. Ray*? 62. *Wendons* 546. *1 Hal* 484. *Sul* 407. *1 Bos* 429. *2 Com* 234. *Str* 953. - That the battery must have been in

Private Wrongs Assault & Battery,

defence of the wife &c. to prevent him from being injured - not vindictive. Esp 313. L. Ray? 62. n.

So one may justify battery in defence of his property forcibly invaded, as by breaking a door-gate, &c. But if there is nothing more than a mere entry on a man's close, (which implies force in &an only. the owner is not justified in a battery without a request to depart. Esp 314. Bull 19. Sal 641. 1 Hawk 130.

In case of entry on &ands however, the battery must, in pleading, be justified not as a battery, but as a molestatio manus imposita. Bull. 18. 19. Esp 314. 315. L. Ray? 62. Sal. 407. 5 Com 355. 1 Mod 36. 3 At 16. 78. Contra. -

The last rules contemplate the owner of property in possession, & relate to his right of defending his possession. But when he is dispossessed or dispossessed, a different rule now obtains, tho as to real prop^y. not known to the C. L.

At C. Law one who had a right of possession in entry on lands, was allowed to regain possession by force, from the dispossessor or dispossessor. 2 Bac 555. 3 Blc 179. 4 At 148.

But now by several English Statutes (the first of which is the 5. Rich? 2.) one may not enter on lands of which another is in possession, (as by holding over after a term expired, or taking a vacant possession) except in a peaceable manner. 2 Bac 555. 4 Blc 148. 3 At 179. Law the same by Stat. in Con. Stat. c. 209.

These Statutes contemplate only possessions which are in some way, & in some degree abandoned by the owner. As in the case of a lease when the possession is given to the Lessee; & in case of lands of which the

Private Monies. }

Assault & Battery.

possession is neglected by owner & vacant. (Mundy taking)
a journey is not an abandonment, so as to exclude
owner's right to use force. Post. Tit. Forceable Entry 1.

In case of personal property, owner not allowed
to ret. to regain possession by force. (3 Bl. 4. 5. 3 Inst. 134.
2 Roll R. 55. 6. 2 Rol 55. 6.) unless feloniously taken.

Provocation never justifies a battery, but may mit-
igate damages. 1 Wils 6. Esp 217.

A Servant cannot justify a battery in defence of
his master's goods. 5 Coon 354. Cro E. 1142.

Assault & Battery at different times cannot be laid
with a continuance. nor diversis diebus et vicibus (Esp 316.)

For an assault is one entire individual act. (Comp 823.)

See 3 Bl 212. Sal 638. 9.

For battery of wife, hus. & wife sh. join, & the injury
sh. be laid, ad damnum ipsorum. For Husband is
damnsified by expense & cost of suing, & the wife is per-
sonally injured, & the damages w. survive to her. (Esp 316.
1 Stile 387. 1 Roll 782. L. Ray? 1208.

If damages are laid ad damnum of the husband only,
judgment arrested. Esp 316. L. Ray? 1208.

If p'ss are not husband & wife it must be pleaded
in abatement. Esp 321. Stra 480.

If battery has been committed to husband & wife, he
alone must sue for the injury to himself. Esp 316.
L. Ray? 1208. 1 Roll 782. pl. 2. See Cro J. 555. That if both
join in this case, for both batteries & several damages,
will abate upon the husb. (Esp 316.) after verdict. If joint
damages, judgment arrested in toto.

Private Wrongs;

Assault & Battery.

Plff. may lay in aggravation of damages, & isaid many facts for which he could not himself move. E.g. a paunching servants. Esp 317. Sal 642. Du. As to aggravate damages, or to show how enormous the trespass was? - Ab. auth.

Pleadings.

The Eng. a justification must be pleaded. in case of a battery under assault & battery. If it cannot be given in writ in a writ the general plea of Son assault &c. Esp 317. Co. lit. 282. i.e. where the writ in the facts shows a prima facie a trespass.

But circumstances which attended the transaction, as words spoken at the time, tending to create mutiny in the Ship, may be proved in mitigation of damages, tho' if pleaded they w^d have been a justification. Esp 317.

If wife justifies an assault &c. he must confess & batte-ry, or the plea is ill. Esp 318. Sal 637. E.g. Plea that wife has run away with him ag^t his will. - there is no battery by wife.

The general replication to a plea of son assault &c. is de injuria &c. Esp 317. 1 Bac 133. 5 Com 354. [de injuria &c. is a denial of wife's plea son assault &c.]

If wife pleads son assault &c. & plff. justifies the assault, he must reply it specially for he cannot give his justification on evidence under the general replication de injuria &c. Esp 317. Com 258.

Matter of excuse may be either pleading or given in evidence. Esp 317. Russ 17. Sal 637. 40 Co 456. as inevitable accident.

Private wrongs.

Assault & battery.

To the plea of "mutual manumission" the plff may reply "de son tort domine ne" (which I suppose includes a denial of the justification) or "an outrageous battery" (subject to mutual manumission) &c. 5 Com 355. 10th 381. 2d ed. 1486. Com. Pleas 3. M. 16.

If not confined, or proof to the same kind in the declaration, may prove any battery (not barred by the Stat. in detentions). So special plea must cover all the time, must be as broad as the declaration. vid. 3 Bac 206. 7. 1 Bul, 108. 2 Star 245. Co. L. 228. 206 104. 15. Reg? 229. 231. Esp 49. 221. 319. 410. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

And so to traverse as to prior & subsequent time, when he pleads for assault domine ne? perm. mot. (Bul. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

So the plea should be as broad as the declaration as to the subject matter, i.e. should cover the whole injury. Esp 318. E.g. If plff changes assault, battery wounding, a plea reaching the battery & not the wounding is ill. 100 E. 203. So assault domine ne covers the whole & a variance? Esp 318. For the words are "that the plff made an assault &c & that D. &c then & there defended himself & of any damage or hurt it happened" &c. "Adversus p. 44." So if "mutual manumission" &c. &c. that does not answer the allegation of wounding.

Justifications founded on the relations of husband & wife, servant &c. the assault &c. must be shown to have been made, to prevent injury to wife, husband master &c. not by way of revenge. Esp 318. 5. Reg? 62. 4. 2. Ro. 546. 10. 1002.

Note. Court pleas & law must join in all cases. 100. 203.

Private Memoirs.

Frank Waller.

A former recovery of damages $\$500.00$ or so other is a good plea in Wex. Chot 50. Esp. 349. 618. Lat 4. Co. 174. Bull 24. y. 68. 3 Wex 185. 1 Com 111. 112. For the uncertain damages are reduced in sum judicatum, which takes away 09. Satisfaction not necessary. etc. The reason that in case of such damages being uncertain plaintiff might multiply actions from the hope of obtaining more. In case of contract the sum being certain he was not an inducement, if the original Debt. is solvent.

The rule holds even if further damage accrues after
first recovery. Esp 319 Salk 11. For the cutting is the gist.

It is in this paper generally a former meaning, as a law, as
 to all countries this paper is committed before the date of the
 first writ. 2 Nov. 32.0.

In this action, as in all trespasses, if the injury is done by several, the plff. may sue all or any. Ex 31, 32. 2065.

Release to one, is to all. Esp 415. 76 St. 86. When ever
a divorce court is made. If he justifies, the husband
must join in the plea, because every plea must be
signed by an atty, who has not the power of appoint-
ing one. Cro L. 239. f

Severing Images.

exp't to covering Damages, both^{ly} contradictory.

of two or more, an charges jointly, some found jointly
guilty, is each guilty of all. They cannot sever
damages. i.e. \$21,425.50 & 2,480.00. Each 1/2 \$11,952.75.
It is \$118. - the three places jointly were 0.

His judgment goes out both by default

Private Wrongs.

Assault & Battery.

the damages cannot be served. Esp 428. Stra 422.

If both sever in their pleas, e.g. one pleading the general issue another a justification &c. jury may sever. tho' the several defts are supposed to be equally guilty, according to Esp 420. 2 Stra 1140. Cases contra 11 Co 67. Bull 20. d. C. Cro. A. 348. or 350. Carth 19. So Cro. 864. 16066. 4 Co 79. Stra 910. Cro. A. 384. 118 contra Esp 321. Cro. A. 118. Idem. See 1 San 2207. n. that the dam^s cannot be served 5 Bur. 2792.

But in the cases, where the damages ought not to be served, plff. may prevent Deft. from arresting judgment or taking issue, by admitting one assumpsit, & taking judgment, for one only. There can be only one execution, in these cases. Bull 20. Carth 19. 11 Co 7. Execution may go only vs. the one, vs. whom its amount was assumpsit. Carth 20. Bull 20. 1 San 2207. n. 67. 12 199. 200. Cro. C. 239. 243. If plff. will enter a nolo prosequi as to the other, or without a not. pros. he may take judgment for 7: greater dam^s ag^t 5. th.

Plff. may arrest judgment in these cases, if he so elects, or he may enter a not. pros. as to one Deft, & take judgment vs. the other for the one assumpsit. Bull 20. Cro. C. 173. 176. Carth 19. 1606. 70.

It is said that jury, may, in trespass, find one guilty as to one part, & another as to another, & assumpsit dam^s severally, & the finding will be good. (Esp 420. Cro. C. 868.) without remittitur. (Plea supposed to be the general issue. When they are not found jointly guilty... 11 Co. 57. a. con. unless the different defts. are found guilty of different parts at different times. This qualification adopted by our Sup. Ct. Middle & County.

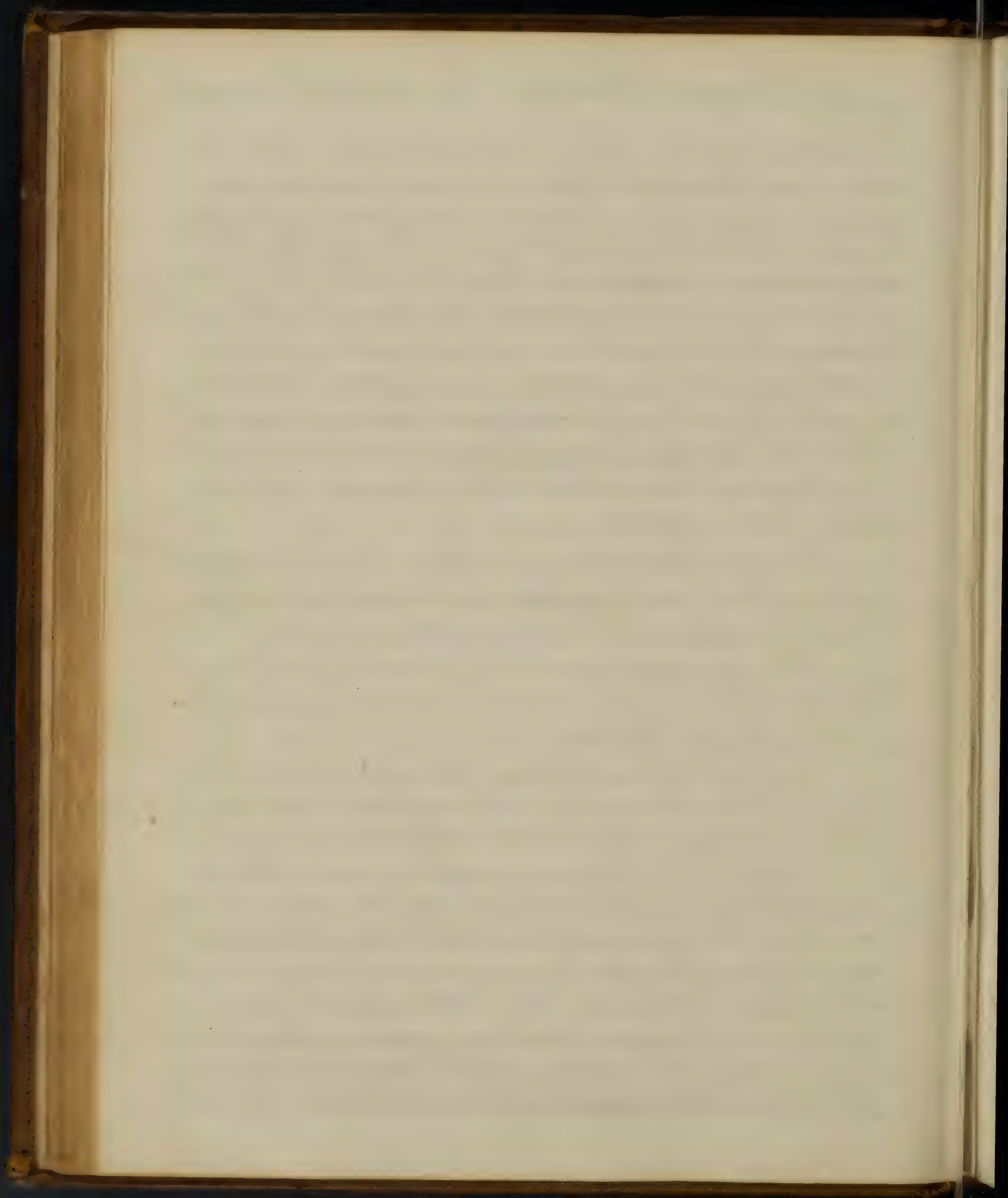
Nothing more than is in issue is allowed. If there has been a mayhem, the Pl. may on view increase damages at their discretion; and the no mayhem is expressly laid in the Declaration. They may increase it if the Judge certifies or reports it. But it must be done in Bank. It cannot be done by a Judge of Hisi prius. A pleff must be present when motion to increase is made. Founded on the rule, that in appeal of mayhem, "mayhem or not" is to be tried by inspection. Esp 322. 12. Ray. 170. Latch 223. 3 BL 332. 3. 1 Sid 108. 1 Wils 5. It must be proved to be the same hurt, for which the damages were given by Jury. Bull 21. Esp 322.

So damages increased, ut supra, in case of wounding. Esp 322. L. Ray. 176. So of atrocious battery. 3 BL 332. & danger of wounding must be laid in the declaration.

Damages not increased in these cases, if the Judge who tried the cause, declares himself satisfied with the verdict. Esp 322. 1 Wils 5.

The Jury cannot give more damages than are laid. Esp 420. Croc 297. But if they do pleff may have judgment on admitting the excess. Carth 21. 10 Co 115. 176 BL 643. 4 Bac 25. 6.

Every assault & battery is a public as well as private wrong (1 Bac 136. 1 Hawk 134. 3 BL 121. 4 BL 145. punishable by fine & imprisonment. 4 BL 216. Stat. Cox 336. 7. Title "Public wrongs". Secret assault a distinct offence under our Stat. Stat 338. So the remedy is distinct from that in other assaults. Several may be joined, when the secret assault is by several. 11th 118. The person who is secretly beaten may (by Cox Stat.) by applying to a Justice of the Peace or other magistrate, & making oath of the battery, & the person who committed it, have a forthwith process, & the Justice will bind him over to appear at the next Ct.



Private Wrongs.

Action of Trespass vi et armis
for

False Imprisonment.

Every unlawful restraint of one's liberty, or rather every violation of one's right of locomotion, is false imprisonment. 3 B.C. 127. Esp. 326. D.C. illegal confinement in a private house. 5 B.C. 127. 2 Ins. 589. 5 B.C. 169. Hensch. 8. 202.

It follows therefore from the definition of false imprisonment, that there are two requisites essential to the constitution of this wrong, viz., 1st detention of the person. 2nd Unlawfulness of the detention. 3 B.C. 127. 2 Ins. 589. 5 B.C. 169. Hensch. 8. 202.

The unlawfulness consists in want of authority. Authority may arise from legal process (Esp. 333. 2 Ins. 404.) or from special cause amounting, from the necessity of the case to a justification (3 B.C. 127) as the arresting of a felon by a private person (Esp. 334) post. It lies not for the crew of a ship captured as prize, tho' sh. prove to be no prize. - Same of Nations. Doug 572.

But every arrest of a person for a civil cause, without legal process, is unlawful restraint. (5 B.C. 169. 2 Ins. 589.) A custom to imprison, without legal process, is not good. 5 B.C. 169. 2 B.C. 147.

A private person not guilty of false imprisonment by confining a person arrested by a proper officer, at the officer's request. 5 B.C. 169. pl. 24. 2 Roll. 561. decided that an

Private Wrongs.

False Imprisonment.

Officer having made arrest on final process, cannot delegate his right of custody, in his own absence. 11005 4 Pub. 24.

In most common cases, are those of arrests under writ process. But the rules in the Books, relative to this particular are not precise, but in some cases even contradictory.

Of the Liability of Courts.

If a Court of Record is guilty of corrupt practices in imprisoning thro' malice, the Judge is not liable to an action, if he acts judicially, & within his jurisdiction. Esp 326. Sal 396. Comf 172. ("Hale's Prosec.") Esp 635. 10 R. 503. 513. 514. 534. 535. 537. 2 B. R. 1141.

In Eng. a Judge of a Ct of Record of general jurisdiction it seems, is not liable for any judicial act, whether it happens thro' mistake or malice, if he confines himself to his proper jurisdiction. Esp 326. 10 Co 23. 4. Sal 396. 2 B. R. 1141. Comf 172. 10 R. 503. 534. 535. 537. 538. 513. 514. 2 B. R. 1141. When all the cases are cited. No proof in this case admitted against this "vehement & violent presumption," in favor of the Judges integrity.

But it seems if a Ct of Record of even general jurisdiction, has not jurisdiction as to the subject matter, Judges are liable, for how they do not act judicially. 10 Co 76. 1 Hawk 86. 59. But if they have jurisdiction of the subject, & in their proceedings transgress their jurisdiction, they are not liable. 10 Co 76. 2 B. R. 1145. Sal 396. C. J. awarding a Capias against a person in a civil case. Ct. of limited jurisdiction: tho' it seems probable if they transgress their jurisdiction by mistake. 10 R. 512. 2 B. R. 1145. C. R. 454. Sal 396. 2 B. R. 1145. Esp 331. 2 Co 119.

Private Wrongs. 3 False Imprisonment.

But if they do not exceed their jurisdiction. 2 BLK. 1143.
Not liable for malicious acts, if they do not exceed their
jurisdiction, they being of record. Esp 320. Hal 346.

Not of record (as jus. pac. in Eng.) are liable. at
C. Lane for mis. mistakes of jury? 10. Bro. C. 286 or 397.
11 BLK. C. 354. 12. R. 336. Esp 339. 11 Bur. 590.

[But unless they transgress their jurisdiction in some
respect. 2 BLK. 1145.] But this rigor is mitigated by sev-
eral Statutes. Esp 338.

But the Ct. of B. R. will not grant an information
vs. a justice, who appears to have acted uprightly. 10. R. 653.
In Con. Justices of Peace, are Cts of record.

Courts which can fine & imprison, said to be Cts of record.
L. Ray? 467. Hal 200. Lamb. 491. 3 BLK. 25. 12. Mod 386. Denied
to be universally true. 2 BLK. 1146.

Commissioners on the Estate of an insolvent Debtor,
not a Ct. of record in Con. No appeal from their deci-
sions as a Court.

Of persons Exempt from arrest.

Arresting Executor or Administrator for the debts of
Testator. &c. unlawful - except on a suggestion of devastat-
ion. Esp 326. 3 Wils 368. 2 BLK. 1192. False imprisonment
lies, in this case vs. the Attys, as well as y^e original p^{er}ff.
It. - And the rule is general, that an atty, who is in-
strumental in causing an illegal arrest, is liable with the
principal. 3 Wils 345. 377. 2 BLK. 1192.

In this case I apprehend the Officer would not be liable.
the subject matter being cognizable by a person being

Civile Honors. False Imprisonment.

amenable to, the Court [for the cause of action having a
 venue within its local limits.] - 10 Co. 78. 2 Wils. 385. Esp. 391.

1 Lev. 95. Stra. 710. provides the C. of general jurisdiction.

Exemptions from arrest are sometimes in Eng. connected
 with the character of the individual, as *Exec.* *Supra*. Some-
 times it arises from temporary circumstances, as particu-
 lar privilege. As [The privilege of a Suitor, extends to
 his house, monij necessarios] 4 Com. 475. 4 Bac. 222. 2 Rol. 273.
 1 W. Bl. 636. attendance on C. as a Suitor or witness. In
 the latter cases the arrest is not illegal in the first in-
 stance - but a superseas as *is* is is (4 Bac. 222. 3 W. Bl. 539. 2 W. Bl.
 1142. 1113. 4 T. R. 377.) after 5 Bac. 171. Cro. 379. Doug. 649. 652

which detention is illegal & action lies. *See* against the *offi-*
cial or *pl. ff. on l. 2*. Doug. 652. Cro. 379. 5 Bac. 171. 4 Bac. 684. 5.
F. N. B. 236. 6 Co. 52. 6. - against party & *offi. & condit.* 5 Bac.
 171. Cro. 379. 4 Bac. 684. 5. 3 Bul. 97. [What is said by *Bul. &*
Doug 652. must relate to an action after the *superseas*
 as for the prior detention in case of a *Peer*.]

In *Scots*. a writ of protection, commonly obtained in these
 cases. This is as *superseas* as in Eng. arresting one protected
 is therefore false imprisonment.

The writ in these cases is good. Suit continues.
 1 Rob. 220. 4 W. Bl. 10. 1193.

Trustee or *Peer* certified Bankrupt - officer
 not liable. He is bound to obey the writ. Party may be
 in *Case* Doug. 649. 650. 10 Co. 78. Dec. In case of *two* *parties*?
 2 T. R. 231. Esp. 330. Malicious Prosecution?

Privilege of *Suitors* disclaimed in case of collusion.
 As in *verbal* actions, 2 W. Bl. 1193. Esp. 330. *Sim. p. q.* 1 W. Bl. 333. 11. 11979.

Private Wrongs.

False Imprisonment.

it being discretionary with y^e Ct. to allow or not.

So when a party attends as a volunteer upon a trial, or with a view of insuring profits, when there is none. Sal 544.

Party attending arbitration under rule of Ct. comes within the exemptions. 3 Case 89.

Soldiers detaining prisoner for fees, tho otherwise entitled to discharge, not false imprisonment. 5 Bac 171. 2 Inst.

53) Same law in Con. Secus as to board of officers. R. 2. 94. Root 158.

If the order of Ct. is to confine one in a certain prison, confining in any other is false imprisonment. 5 Bac 171. Sal 408. 5 Mod 295. 3 Sal 219.

A peace officer is justified in arresting without warrant, on a reasonable charge of felony, tho no felony is committed. Doug. 334. 345. 4 Bac 517 pl. 73. 1 Rol. 43. Secus of a private person. But...

If a felony has been actually committed, a private person suspecting another to be guilty, on reasonable ground without malice, is not liable for arresting without warrant, to carry before a magistrate. Esp 334. 5. 5 Bac 171. Doug 345. Root 66. So to prevent breach of peace or escape. 1 Bul 150. 2 Hawk 82. Secus if no felony has been committed. Esp 334. Doug. 345.

An original arrest on Sunday in civil cases being void by Stat. 29. Car. 2. & Stat. of Geo 379 is false imprisonment. Esp 327. 605. 5 Mod 95. Bul 73. 2 Inst. 111. 4 Bac 456. 10 R. 265. 2 B.C. R. 1195. - Such an arrest goes at C. S. 2 B.C. R. 1195. 2 Buls 72.

But Bail may take their principal on Sunday, tho ad contra, as to Bail to y^e Sheriff. 2 B.C. R. 1273. for he is in nature of a gaoler - principal as a prisoner. & the taking by Bail

Private Wrongs.

False Imprisonment.

as relating on an escape. Such an arrest, under an Escape warrant, is lawful. *Sat* 626. *3 Sat* 148. *Esp* 603. - *2u* 236 1273. Arrest in civil cases by breaking open doors of a fls. house is false imprisonment. *5 Co* 93. *Comp* 1. *Hot* 52. *2 Bac* 367. Secus of inner doors. *2 Mc* 484. See "Shuff's."

It has been questioned whether, if an arrest is made by illegally breaking the house, the execution of y: process is good, & the only remedy by action, or whether y: execution itself is void, & may be set aside in a summary way, by discharging the person arrested. *Comp* 1. *g*. *Esp* 604.5. not decided. Said the County interference is discretionary. - this was a case of breaking doors. *608*. *908*. *Kinty* 383.

Since decided that the execution of the process was void; in case of property taken by breaking a door & execution set aside. *2 Bac* 367. *2 Geo* 285. *6 Con*. & *50* *5 Co* 93.

In the last case false imprisonment lies, i.e. cases of breaking doors. Different from case of seizure. In the latter on account of y: privilege of the party. In the former case the y: arrest is illegal. *Hot* 62. *Comp* 1. *g*.

Also questioned whether if an illegal arrest is made, in consequence of which another arrest is made, which is otherwise good. The latter is valid. It is valid, unless some collusion. *2 Bl* 11. 823. - *Aliter* if there is collusion, *50 Mc*. *Ab*.

Decided an officer by escape warrant, may relate his prisoner to another State. *1000* 1071. The warrant is of no use. *As to* bail price from another State, *3 Esp* 172. *u*.

If an officer by mistake arrests B. instead of A, he

Private Men.

False Imprisonment.

is liable for false imprisonment. To cover if B. declare himself to be. 4. Doug 42. 2 Rot. 552. pl. 5. 13p. 225. 2 Com 440. 445. 2 Rot 552. Moor 457. Hard 323. Re. damages mitigated. 20p 328.

In case arresting with body on, misine, or fined process in civil cases when sufficient personal property is tendered, is false imprisonment. 1 Root 120. 2 Rev. 191. 5 Bac 174. for the proofs is against both.

Any person has a right to arrest another who is fighting. 5 Bac 171. 1 Hawk 136. 2 Ab. 81. 5 to restrain him till his passion is over.

In certain cases, femes covert the liable to be sued with their husbands, cannot be held under arrests or mesne process. 2 Stra 1272. 17. 12. 486. 1 Bl. R. 720. But there is no instance of false imprisonment brought in these cases. Doug 648. argus, can it be tried? See 115. 2. 76. 136. 17.

In the last case (of femes covert) no action I conceive will lie - the proofs is legal, tho' the service is sometimes set aside, & the fine discharged. 2 Bl. R. 1193. 4. analogy - Doug 648. argus - original arrest not illegal.

Arresting & confining one, for a short time under a parol warrant from a justice, for examination, is not illegal 5 Bac 172. Root 166. Moor 408. See Cro E. 829.

A private person may, without warrant, confine a person disordered in mind, & who appears disposed to do mischief. 5 Bac 172.

Private Wrongs. }

False Imprisonment. }

Of the Liability of Officers.

If an officer makes an arrest on a process, from the face of which it appears, that the Ct. issuing has no jurisdiction, he is liable according to the current of authority. *Est. 391. Bull. 82. 3. How 480* from whatever cause the defect of jurisdiction arises. *S. Ray? 230 con. See Coust 20* But the rule has been extended farther—

Thus it has been held (without any regard to the defect appearing on the face of the process or not) that when a Ct. of limited jurisdiction, has no jurisdiction of the cause (from whatever quarter the defect of jurisdiction arose) the officer would be liable. *10 Co 70. 77. Cro. A. 314. Est. 337. Decision & reasoning in Marshalsea case. Contradicted in S. Ray? 230. Stra 710. 993. 509. See supported in 2 Leitch 380. S. C. Est. 398. 7.*

Decision in the Marshalsea case seems to be still law in Eng? viz. that when y^e Ct. issuing the process has no jurisdiction of the subject matter, every thing done under it is absolutely void, whether it appears or not on the face. *Est. 391. Bull. 82. 3. Vent. 333. 4. Coust 172. How 480. Stra 710. Rev. 2 S. R. 653. 4.*

But where the Court, the of limited jurisdiction, has jurisdiction of the subject matter, & the defect of jurisdiction is from something local or personal, the officer is justified unless the defect appears upon the face of the process. *Coust 20. 5 Bac 170. 2 Mod 146. Vent. 369. 1 Bull 32. 3. Coust 274 2 Mod 29. 3 Bac 233. Est. 391. How 480. Stra 710. and according to S. Ray? 230. 231. Coust 20. 6*

Private Wrongs.

Milke Imprisonment.

is not liable even in this case, because the original writ ought to have pleaded it. *Went 23. com. 106. 76. 6 Co 34. 2. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

Officer may justify under command of the Ct. of Westminster Hall, tho' the writ be void, except when the Ct. has not jurisdiction of the subject matter. *10 Co 76. 6 Co 54. 3 Wils 345.*

In law, an officer is justified in all cases unless the process is void upon the face of it. *Kirby 110 132. 7 Co 33.* [When the jurisdiction is complete, & the process is malicious and founded, the officer is justified. *20 10. 231. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

Where the Court having jurisdiction of the cause proceeds erroneously or improperly, still if the process appears regular, the officer is justified. *Stea 10. 20 10. 231. 7 Co 453 315 ac 333. 2 Wils 488. 9. 3 Wils 345.*

Rule seems to be in Eng^d according to the weight of authority, that when the subject matter is out of the jurisdiction, whether the jurisdiction is general or limited, process is void & officer is liable. But when the want of jurisdiction, is as to the person or place, then officer not liable, unless it appears from the face of the process, more than in case of courts of Westminster. But the latter branch of the rule tho' true of misse process, applies not to final process (issued by inferior Cts) without qualification. e.g. when arrest is under final process of inferior Court, officer justification must show, that it came on within jurisdiction, or at least that it was so said. *But 23. com. 20.*

Verbal Warrant: False Imprisonment.

But the the process under the qualification justifies the officer, it does not the original plff. This binds to know the extent of the Court jurisdiction, & to show it within the cause of action arose. Cro. 1. 314. & 42 the original plff. (now plff.) is not barred by having pleaded to the first action. Esp. 330. 150. 183. 5 Bac 170. 1 Kent 369. 2 East 260. 2 edw. 196. 7. (S. Ray? 239 denied that even original plff. is liable in this case, Antio. 937. 156. 1 Bent 236 an. cit. See Comp 20. S. Ray? 230. approved in this point in Com. by Car. & Ills. with Kirby III.

In some cases process is void, & the party & the Court liable, when the jurisdiction of the Ct. over the cause is complete, as to subject matter, person & place.

IInd. In cases of limited jurisdiction. e.g. when an authority given by Stat. is not strictly pursued. Esp 331. 332. 3 Co 114. Sal 408. 1 Stra 710. - When a Justice committed plff. for killing game, tho he had sufficient off. to answer the penalty - officer & excuse - but the illegality of the warrant was not fatal. (1 Wils 153. Esp 332. S.C.) where person was committed on Stat. penalty of 133 which he offered to pay, but was imprisoned by Constable till he paid the fees which the Stat. did not allow. Here the Constable was liab. This was for abuse of process. no question of jurisdiction. So agt Commissioners of Bankrupts, for any commitment, not warranted by their Stat. powers. Esp 331. 2. 101. n. 1035. 1141.

IIIrd. So, in other cases the process over the Ct. of Westminster (or any Court) aside from any objection to the jurisdiction of the Ct. is either void, or the plff. & the

Private Strong's. 3 False Imprisonment.

proofs liable to this action. // He is liable by reason of some irregularity. e.g. a capias returnable the next term, but one to that of the tunc. Esp 323. 4 Horn 491. 3 Wils 341. 5. 2 Bl. R. 845. Sal 700. 11 Mod 315. - Officer not liable, 3 Wils 345. in this case if the proof is from the Ct. of Westminster, Star, & tho' the irregularity appears on the face. Same rule probably in Com. Ple.

11th. ^{ed} So, tho' the original arrest were lawful, yet for any subsequent oppression, this action lies ag^t the officer in the magistrate if he is in fault. e.g. wantonly in confining in a dungeon without air &c. Esp 332. ctd. 1 T. R. 536. Commitment by military comm. under jurisdiction of magistrate here also appears.

When an officer justifies, proof that he acts as an officer is sufficient as to that fact. He is not bound to show his appointment. 1 Stra 1005. 3 T. R. 630. 406. 386. 2 M. R. 485. Qu. may not this be rebutted?

Of Irregular processes.

General rule: An arrest under an irregular process is void: So under a process of arrest, founded on an irregular proceeding. e.g. arrest on an excon. issued on a judgment set aside for irregularity. Esp 329. 391. 3 East 124. 1 Stra 509. 2 Ray 73. Vin. tit. vacat. 1 Ser 95. 1 Sid 277. 1 Wils 155. Said that the officer serving the process is not liable (Esp 391) // i.e. in case of process of Westminster. 1 Wils 345. Qu. if the Ct is of limited jurisdiction & irregularity appears. 2 Stra 493. 4.

But an arrest, on an erroneous process is good. 4 Burr 450. 1 Stra 514. 3 Wils 345. Esp 391. Therefore the party may justify under erroneous process, till it be reversed. 3 Wils 345.

Private Wrongs 3 False Imprisonment.

Process has been holden irregular since when
issued up without proper authority. e.g. when in Eng.
the under Sheriff like a blank for ally, to fill with the
name of a "Warrant" up 22. 2. 1847. The person seen here
was the person serving the process. He does not appear
that he knew of the irregularity. (Inferior authority
e.g. Sheriff's warrant. See in Cor. su. Stat. 24 387.

With rules when directed to an indifferent person
unless the name is inserted by the magistrate. So a writ
drawn by Sheriff, except in their own cases.

So when the process has issued formally. (Pro-
cess out of the W. Ch. of Oxford. Custom original paper
making oath of his cause of action, & that he "believes"
he swore that he suspected it. up 22. 2. 1847. - Party the
officer & others not on liability all joining in one plea.
Strange adds. the officer & others might have justified. See
rule 24 385. & the whole said to be common law justice.

If the meaning of the above is this according to Judge W.
The Chancellor of Oxford has power to hold a Ct. by Stat. for the
benefit of the Students. The Stat. requires that the person, who
sues in this Ct. shall come & swear before the Chancellor, that
he "believes" a certain thing to have taken place, as e.g.
property stolen & etc. this is done the Chancellor cannot issue
a writ. The party sworn he "suspects" to be the Chan-
cellor issues his warrant, & on an action lost is the Chan-
cellor the Officer & the Party a false imprisonment they
are all held liable - they joined in the Gen. issue. But since
the Judge & the Officer & others justified, they will have been
released, as the defect did not appear on the face of the process.

Private Wrongs: } False Imprisonment.

So where the writ is not returnable on a day certain; irregular. Esp 330. Cro. L. 314. 2 Ry. 267. Pl. 33. 2 Wul. 56. 1 Hall 81. 2 Ry. at the next Ct. of the Marshals.

But this rule applies only to mesne process. Comp. 21. & thus once been denied, even in case of mesne process. 2 Hall 81. Comp. 21. 2 Ry. 267. 1 Hall 81. & judges sufficient.

Also see as to our Sup. & Cty. Cts. which have settled terms, established by general law.

Search Warrants.

Warrants under general search warrants are illegal. So are general warrants of any kind. As a warrant to arrest "the authors of a libel" which they are. Esp 399. 1 Hall 100. 6. 1502. Wills 275. 11 Ry. 213.

Requisites to search warrants: 1.st Granted on oath. 2.nd The grounds of suspicion declared. 3.rd Granted in the day time. by a known officer, & in the presence of the in former. 4.th directed to a particular place (as the particular person on whose suspicion of.)

When the requisites are observed, the informer is justified or not by the event. Esp 399. 2 Wills 291. 2.

When the officer serving a process justifies under it, he need show only the writ or process itself. (Esp 333. 337. 6 Co 52. 2 Hall 563.) & that it is returned if mesne process (Esp 337. 2 Hall 1184. See Comp. 20. & the return day has a view.

An Eng. Sheriff under officer not obliged to show the return, because it is not in his power. But the necessity of the officers showing a return obtains only in case of mesne process. Comp. 20. 6 Co 90. 4 Ry. 267. 1 Wills 11.

But if original writ is deft. he must show a judgment.

Private Wrongs, False Imprisonment.

as well as return in case of final process (20p 333. 9. Sal 408. p.) for judgment may have been rendered, before the arrest, & plff. original) ought to take notice of it.

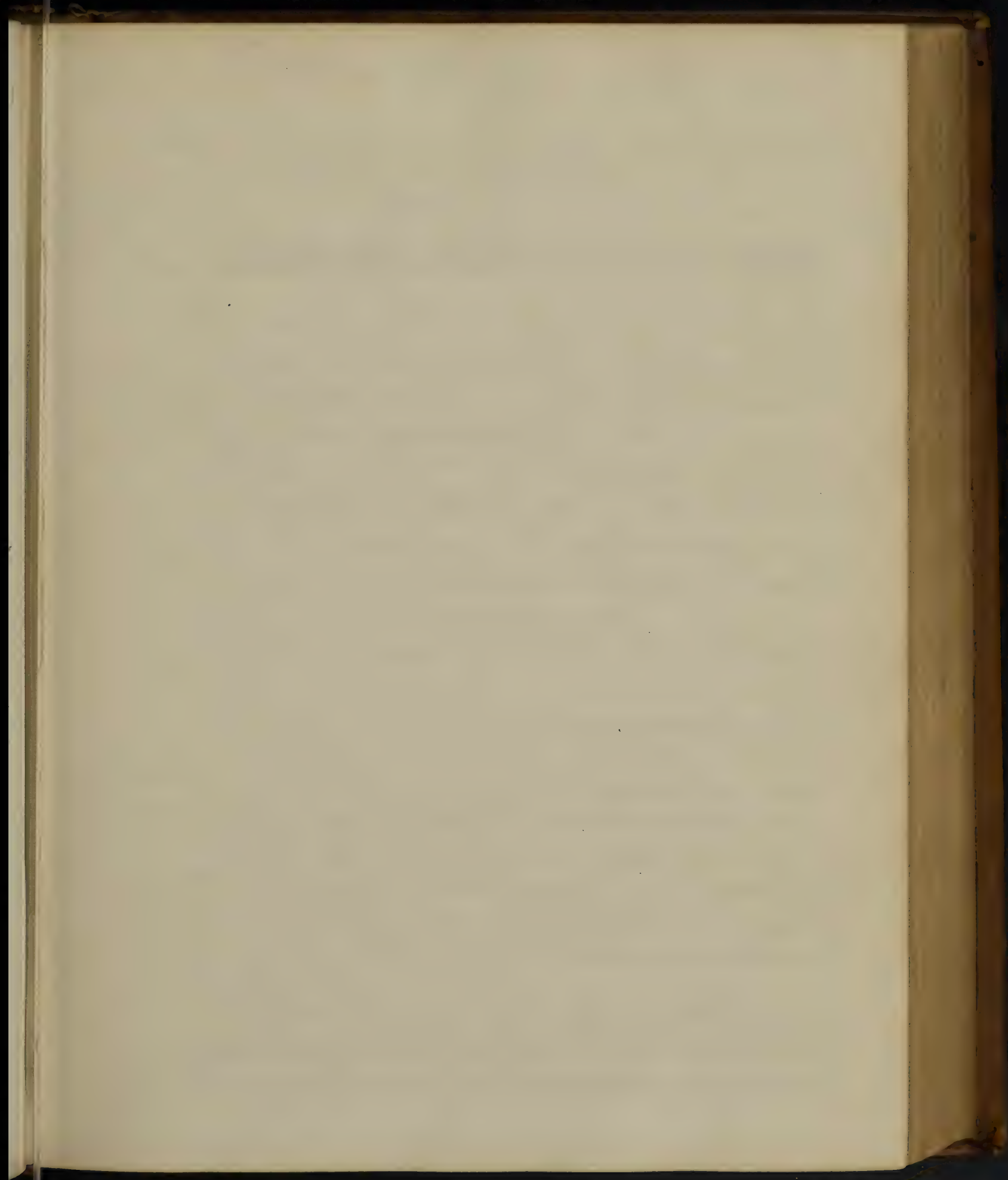
Same rule when the action is vs. a mere stranger who procures the service of process for another; & even if he acts in aid of the officer & at his request. H. Sal.

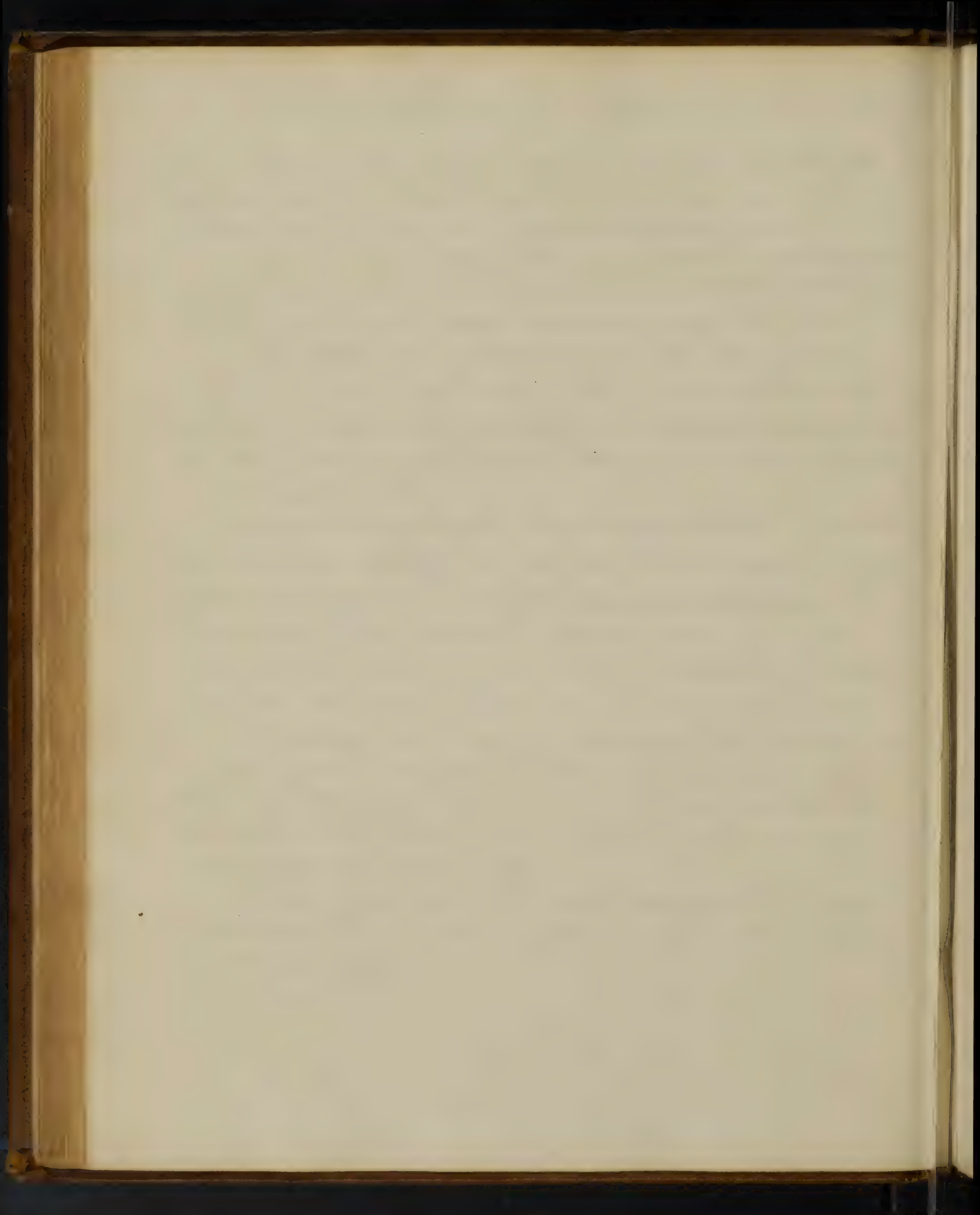
If a Shff. does not return a writ when he ought to do it & or makes a false return, he may be treated as a trespasser at initio. 5 Com. 581. 2. Role 563. 5 Bac 162. Sal 409. E. Ray. 632. tho' this is more onerous; for the return is necessary to complete & validate the act.

If original plff. & officer are sued together they may serve in defending - but they join the plea of justification is insufficient for plff. it is so for officer. 20p 336. Stra 993. 1184. 509. So E. converso, if plea is not good for officer then so for original plff. he loses his defence by joining. 20p 336. Stra 1184. 1166. 17. 2. g. officer does not show grounds of yr. process when he ought to do it.

Procuring, commanding, aiding, assisting maintain a trespasser principal - Co. lit 577. Sal 409. 2 Hawk 512. Servant keeping the key of a room, knowing that one is imprisoned in it, is guilty of false imprisonment. 3 Co. lit 577. 5 Com 579. Co. lit 577.

Procuring even a sovereign prince, though feared to imprison one is false imprisonment in the procurer. 2 Bl. R. 433. 1155.





Mutual Wrongs
Action on the Case
for
Malicious Prosecution. By Mr. B. 1808.

This action is to recover damages to one who has suffered an indictment or other prosecution, or brought an action, or suffered from a wrongful motive, i.e. malice, without any ground or probable cause. 12th. 116. Esp 525. 27. 8. 113ac 61

Analogous to the old action of conspiracy, which is now much out of use. Conspiracy lies only to two or more for having falsely maliciously prosecuted the plaintiff, for treason, or felony, & thus endangered his life. 1st. 234. Finch 235. 3rd. 126. 2d. 271. 1st. 230. Esp 530. 1 Com. 109. 2d. 114. 379.

Another analogous action, is the action on the case in nature of a conspiracy.

Action on the case in nature of conspiracy lies, when two or more conspire, to prosecute another maliciously, & without cause; & otherwise conspire to injure him in person, fame, or property. Finch 235. Tal 19. Esp 530. 113ac 61. 1st. 230.

The gravamen in action for malicious prosecution resembles, in some measure, that of slander. It is not necessity or generally the danger to which plaintiff has been exposed, but the vexation, expense & scandal. 5th. 107. 10th. 219. 20. Stra 641. Tal. 13. 14.

Action of conspiracy lies not, unless plaintiff has been actually prosecuted, Esp 527. 8. & acquitted (12 Co 23. Com 18. 1st. 112) for to use the words of the writ. 12th. 114. 116. 230. 1st. 112.

Private Wrong.

Malicious Prosecution.

Esp 330. 1 Com 121. Indictment for conspiracy lies where there has been unlawful conspiracy as above the matter is executed. 2 Com 51. 4 Geo 55. Esp 334. In action on the case in nature of conspiracy lies, the no indictment. It has been actually exhibited. 11 Dec 61. 1 Rolt 112. 1 Com 158 & 223. It supports charging a crime by conspiracy - injury to reputation.

So, difference between action of conspiracy & action on the case in nature of a conspiracy. In the former, if at least one are acquitted, judge cannot go vs. him. in the latter, judge may go vs. one only. Esp 330. 2 Ray? 379. 1 Com 159. Bull 14. 1 Wils 210. 2 Lev 52. 1 Rolt 111, 112 pl. 5. T. Ray? 176. 3 Mod 408. 6 Mod 169. Cro C. 239. The first is a general writ in the Register? 12 Wils 211. 1 Rolt 13. 250. the latter a special action on the case. In the former, the damage to which the conspiracy exposed the plaintiff is the gist - in the latter it is the consequent damage, scandal &c. Cro C. 416. 3 Rolt 126. 7. Bul 14. 10 Mod 219. 1 Rolt 691. 1 Sand 230. So in case, for malicious prosecution.

The latter (i.e. on the case in nature of a conspiracy) is substantially an action for mal. prosecution with this difference - that the latter may be brought vs. one, no other being concerned the former must be brought vs. two or more, or vs. one charging that he with another or others had conspired &c. 1 Com 159. The grounds of the two actions, are therefore the same. Esp 331. 2 Lev 52. Cro C. 173 or 239. 1 Wils vs. Attily 1 Wils 210. 1 Sand 230. Ray? 176. 3 Mod 408. Bul 14. & the two are said, judge may be vs. one only. It.

Action of conspiracy, 2 Rolt 14. 1 Wils 211. 1 Rolt 416. In the case in nature of - 1 for malicious prosecution.

Private Wrongs & Malicious Prosecution.

all unknown to L. Jan. 3 Rev E.S. 58. - First originated in the reign of Edm. I. formed by his direction, but sanctioned by Parliament. 2 Rev. E.S. 239, 328. 3 Ab. 127. Two latter are derived, I suppose, from the Equity of the Stat. of Wilm. 2. - 2 L. 20.

It is material to the support of this action (for malicious Prosecution) that malice, & want of probable cause in the former prosecution should have concurred. Malice without falsity alone not sufficient. Bull 14. Esp 529. 4 Burr 1971. 1st. W. 544. 5. It lies, ergo, vs one who maliciously promotes a false prosecution, not another, knowing the charge to be false, or having no reasonable ground to believe them true. But it is always sufficient for Wife to show probable cause, whether he acted with malice or not. Bull 14. Esp 533. L. 20. 400.

In Com. when the action is for a false & malicious civil suit, it is called a negativus Clausuit. This division pursued (i.e. the Com. distinction) will be observed - IInd of Criminal Prosecution, false & malicious &c.

If a man is falsely & maliciously indicted for a crime that injures his reputation, he may have this action - 1st 15 yels. 46. Hal 14. So if the charge exposes to danger his life or liberty. Hal 15. No an indictment false &c. Subjecting to expense only is sufficient to support the action. 2. Kay? 378. Hal 15. arg? Stiles 379. Esp 528. Sta. 977. e.g. Husband & wife alone for expense incurred on a malicious prosecution of his wife - action lies.

Examples shewing that danger to the life or liberty is not necessary. The indictments having been issued.

such a plaintiff is in no danger of a conviction, is no answer to the action, if the charge injures his reputation: 1 Esp 528. 4 D. R. 248. 2 B. & C. 127. Sal 15. 11 Bac 61. Scandal. revelation & expense sufficient.

So, if the indictment in the last case, has not been found, by the grand jury, yet the action lies, for the vexation, expense, scandal &c. 1 Esp 528. Croft 490. Sal 14.

No expense alone, caused by insufficient indictment will support the action. e.g. indictments for exercising a trade without license - tho the reputation of the party is not injured, nor his personal security endangered. Sal 15 in margin. 3 B. & C. 127. 14 Mod 148. 214. 6 Mod 25. 73. 137. 11 Bac 61. 1 Esp 528. 2 Stra 977. Sal 14. 15. Cor.

Public officers commencing prosecutions on false information not liable - but the person giving it false information, knowing it to be false, or without probable cause, is liable. 1 Leon 187. Cro E. 130. 2 D. R. 231. 11 Bac 61.

But if a public officer without information, & of his own mere motion, maliciously &c. prosecutes another (Comp 161) he is liable. 11 Bac 61. 2 D. R. 231. 225.

Cro E. 130. 1 Com 158. [tho the officer acts ministerially]

But if the public officer in the last case, is the magistrate granting the warrant & the gravamen is, that a p.p. was arrested under it, trespass not case is the proper remedy. And in this respect the case in Cro E. 130 is denied. 2 D. R. 231. 1 Esp 530. see Doug 650 "Hals. Imprisonment".

It must always appear from the declaration that the prosecution for which &c. is, in some way

Private Wrongs: Malicious Prosecution

at an end. In conspiracy, *legitimo modo acquitatus*
necipitate ante. 9 Co. 56. 200. 10 Mod 209. 2 St. R. 231.

1 Co. 267. 1 St. R. 114. "Plff was discharged from prison" not
sufficient because notwithstanding the discharge from
prison, the prosecution may be still pending.

But the omission to show that the prosecution
is at an end, is cured by verdict. If therefore it can be
shown that the prosecution is at an end, it may be
shown by special demurrer. 1 St. R. 278. Esp 532.

An allegation that plff was "acquitted" in the
original prosecution not supported by evidence of
a non pros. for this is not an acquittal. Bul 14. Esp 536.
But 21 Mod 261. The declaration states all the pro-
ceedings in the original prosecution, & any misre-
cital in a material part of the indictment is
fatal. Esp 532. 3. 4 St. R. 590. 2. y. a variance between
the original record & declaration, as to the day of
acquittal. 6 Mod 216. - Secus if it is in an immaterial
part. Esp 532. 2 St. R. 10. 1030.

It seems that no civil action lies against judges
of record, Justices, & grand jurors for any even malicious
acts done in the exercise of their judicial powers.
1 Com. 158. Esp 635. 1 St. R. 503. 13. 14. 534. 5. 7. 8. 600. 161. 172.
1 Hawk 191. 2 R. 10. 328. 2 St. R. 1141. 12 Co 33. 34.
2 Mod 219. See Cro E. 130. "False Imprisonment."

Malice may be, & generally is, inferred from the want of
probable cause. 4 St. R. 1974. But want of probable cause can
not be inferred from the mere report of malice. 1 St. R. 544.
Esp 524.

to prove

Private Wrongs. Malicious Prosecution.

To prove malice p^lff. may give in evidence collateral circumstances, as an advertisement by D^f. that the indictment was found, &c. Esp 535. Stra 691.

Conviction of the p^lff. in the original prosecution, by a competent jurisdiction is conclusive evidence of probable cause. Esp 529. 1 Wils 232. Hob 267. Callod 262.

Acquittal is in most cases presumptive, but more than presumptive evidence of the want of probable cause. not always int^a. - But being presumptive evidence it throws the onus on D^f to prove probable cause in most cases. Esp 520. 1 Wils 232.

So acquittal even on a defect in the original process, is presumptive evidence of want of probable cause, i.e. in most cases et supra. 4 T. R. 247. Bul 15. pl 5. But see whether ignoramus found is prima facie evidence of want of probable cause.

Acquittal not always prima facie evidence of want of probable cause. e.g. If the p^lff. was bound over by a Ct. of Enquiry, or the bill of indictment, has been found by a Grand Jury, onus generally lies on p^lff. who acquitted on the trial; presumption being in favor of complainant, i.e. D^f. Esp 536. Bul 14. Bul 15. So it appears from the report of the Judge that there was probable cause. Bull 14. Esp 529. 30.

But where the facts lie in the knowledge of D^f. him-
self, he must show probable cause, tho the Grand Jury have found a bill of indictment &c. Bull 14. Esp 530. e.g. prosecution for robbing D^f. &c.

The proof of the evidence given before the Grand Jury

Private Wrongs.

Malicious Prosecution.

is good evidence of probable cause. Bull 14. Esp 535, 536, 537. 6 Mod 216, & 218, & 219, at the original trial, as to the existence of the crime charged, is admitted if no other person was present at the time. e.g. supra of prosec^r for robbing Dept.

The existence of probable cause is a mixed Que. partly of fact, partly of law. What amounts to probable cause is a Que. of Law, mainly, — whether the circumstances alleged to prove probable cause, are true, is a Que. of fact — but the fact being given, the inference is a conclusion of Law. 1 T. R. 545, 519. Bull 14. Esp 529.

Therefore regularly, 20thly. plea sh^d. show the grounds of suspicion on which he acted. Cro E. 134. Esp 533.

So it seems necessary for Dept. to show, that y^e crime for which he prosecuted was committed. Secus (somb.) there can be no probable cause. Esp 534. 6 Mod 216. Clinton 33. Hefkins, 2 Hawk 120. e.g. Dept. believes his property to be stolen, when it is not.

So what amounts to malice (on the existence of malice, the facts being given) is a Que. of Law. 2 S. Ray? 1493. 1 T. R. 519. cases cited arg? 11thly 233.

When the action is for a malicious prosecution for felony, a copy of the record granted by the Ct. in which the trial was, is necessary — & the granting is discretionary. Esp 534. 1 B. R. 385. 1 Bac 61. When the crime charged is a misdemeanor only, such copy not necessary. Esp 534. 1 B. R. 385. original produced by Clerk sufficient.

11th. When the action lies for a groundless civil suit — a vexatious Law suit.

General rule, as laid down, that the action does

not lie, for bringing a civil suit, even tho there is no right of action, because it is a claim of right, p. p. is answerable. *actio pro puls. clamore*, & is liable for cost. *Wob. 11. Tul. 13. 14. Esp. 525. 1 Bos. & P. 205.* So no damage presumed. *Secus* for criminal prosecutions.

[To this rule there are exceptions following, viz. Ist

Ist When there is good cause of action in favor of one, & another having no authority sues & arrests the debtor, the *actio format^o*, *pro s^uppos^oitis*. *Lis. Esp. 526. Bul. 12. Tul. 14.*

IInd When p. p. on the original suit having good cause of action, sues in a Ct. not having cognizance, the action lies. *4 Co. 14.* But it is necessary that y^e Def^t & original p. p. should have known that the Ct. had not cognizance. *Esp. 520. Bul. 12. 2 Wils. 305.*

IIIrd If a person having no right of action, nor color of right, & knowing it to be so, sues another for the imposition & vexation, he is now liable. *2 Wils. 305.* no such cases in the old books. *1 Bos. & P. 388. 1 S. 129. 3 East. 314.*

IVth So, if the p. p. purpose he sues him for a much greater sum than is due. *1 Salk. 228. Esp. 525. 6. 1 S. 424.* But it is said that the action will not lie in the last case for vexation; unless p. p. has been holden to excessive bail. *Esp. 526. Bul. 12.*

When the suit is utterly groundless & known to be so by the original p. p. the act is a proper Ct. & no arrest of the person, but merely proper taken action. *Lis. Esp. 527.* The first suit being malicious, & c. Def^t had sued out a 2^d fi. fa. & sold p. p. goods & after having taken the goods under former fi. fa. action lies for vexation & damage. *10 B. 205. Bul. 12. 16 C. 260. 1 Wils. 305.*

Private Wrongs.

Malicious Prosecutions.

The particular gravamen must be stated, when founded on former civil prosecution, & that it was done "maliciously," and "with intent to injure & oppress the p[er]son." 2 Wils. 305. Esp 532. 1 Sal 14. 1 Sid 424. 2 Ray 380. So "on purpose to h[ar]m p[er]son to bail," if that is the injury. Sal 15. Bull 12. - & no damage being presumed - ante.

Qu. whether unnecessarily arresting a debtor, from home, without any particular benefit to creditor, but from apparent malice, is a foundation for this action? &c. -
 did not to be by our sup. &c.

In the above exceptions, it is necessary that special damage be laid & proved. 1 Sal 14. 15. 2 Ray 374. Secus, if a stranger invites A to bring a groundless suit vs B. No special damage necessary as to him (as in crim. cases) nor a claim of right by him - he not amerciable. (Sal 14. 2 Ray 380) nor liable to costs.

Two requisites in all cases to support this action, for a civil suit. 1^o. Former action determined, i.e. ended, for it cannot otherwise appear to have been groundless or unjust. 20 aug 205. Sal 15. -

2^o. Damage, (i.e. actual) already incurred, or inevitable. Esp 527. 531. Sta 119. Bul 13. Therefore if one forge a bond in my name, I can have no action, till sued upon it.

But note necessary that the original suit sh^d. have been decided in favor of the present p[er]son. e.g. nonsuit, suffered on the original action, yet this lies. Esp 527. Bul 13. Any groundless proceeding by action, when ended, is, on this point, sufficient. Esp 527.

Our Stat. gives an action vs all who willingly,

Private Wrong

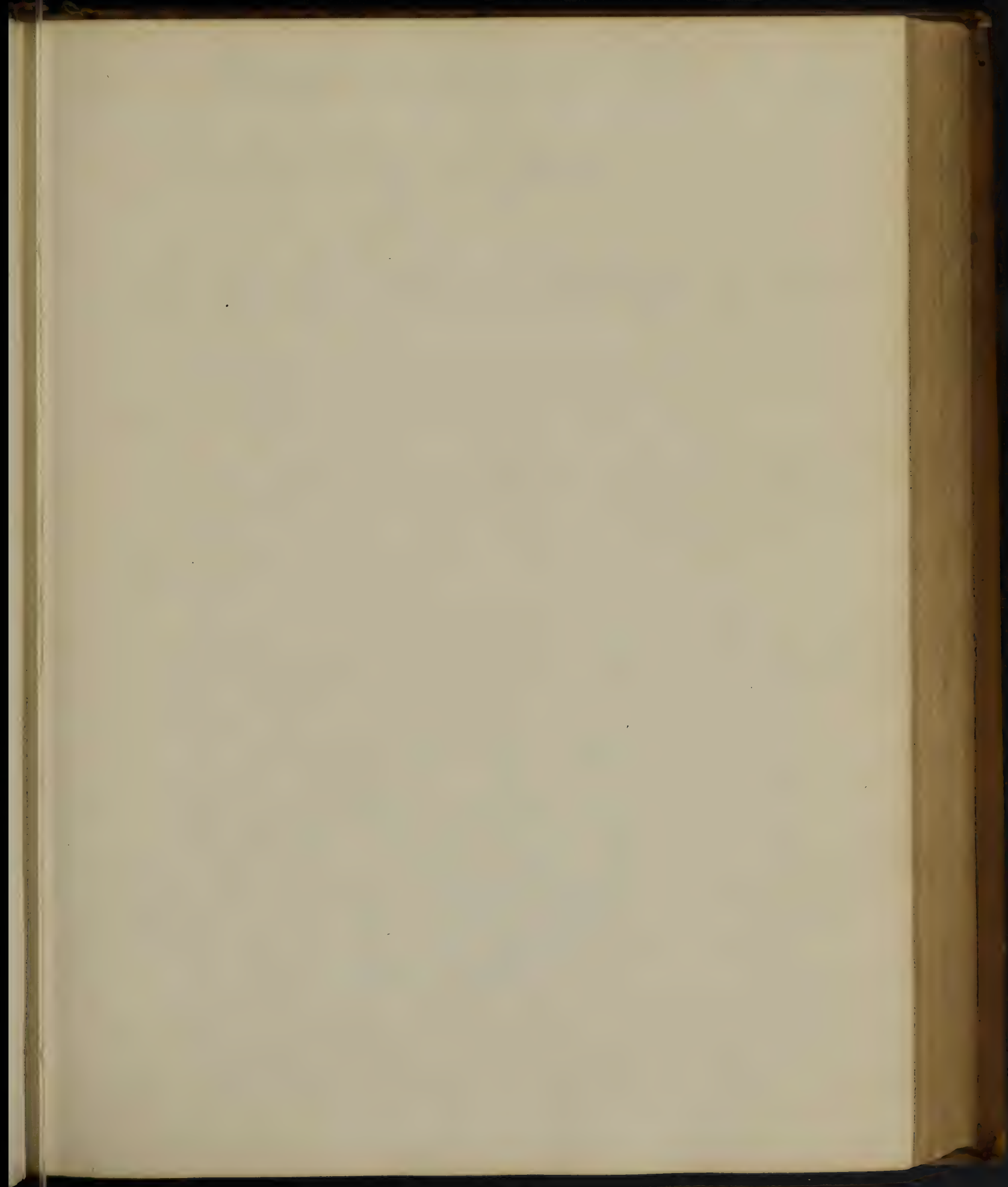
Malicious Prosecution:

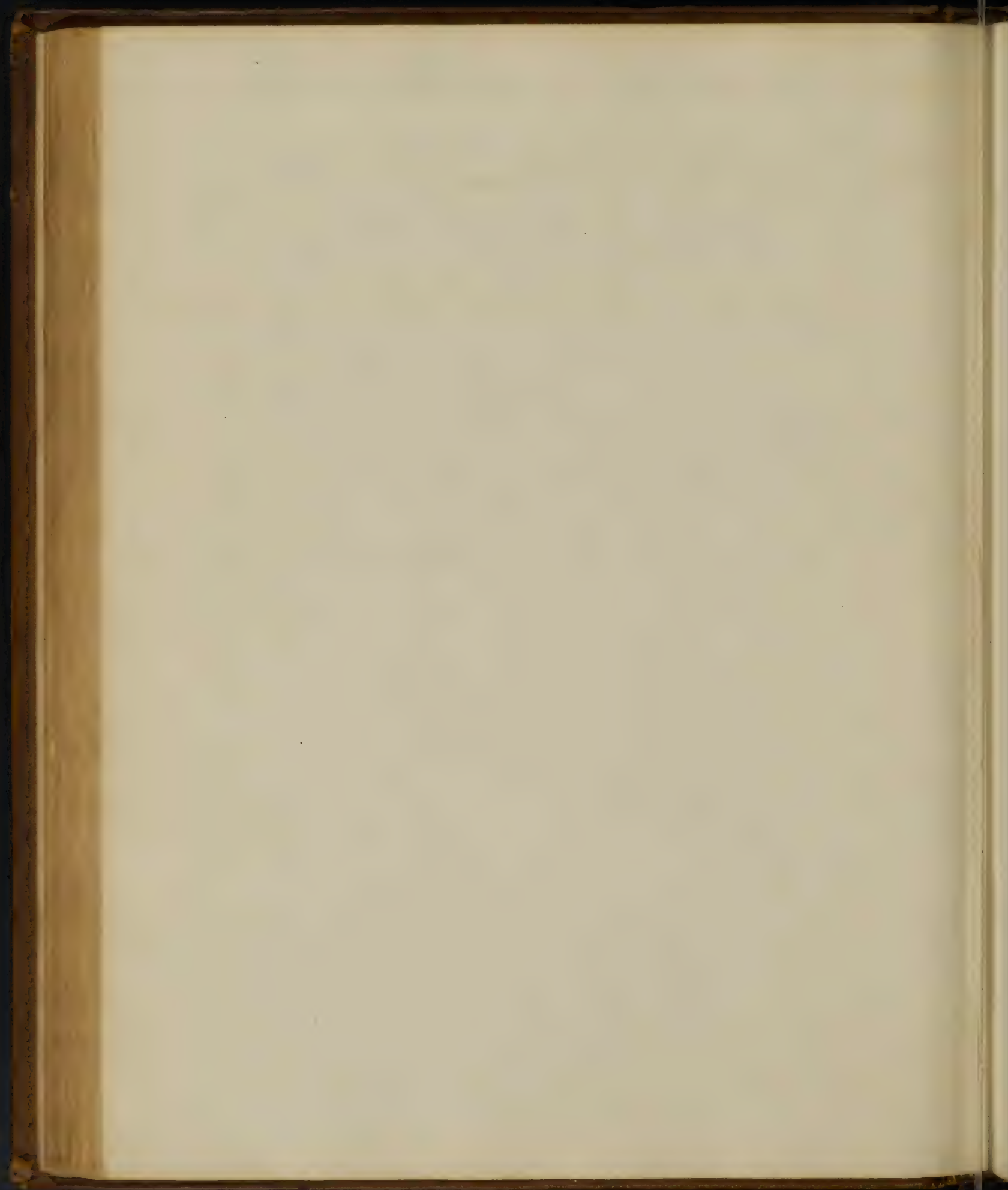
& willingly among others by prosecuting any suit, &c. with intent to vex & trouble &c. & double damages. Stat 429. It also subjects to fine of \$7. for this offence to be proceeded against as a common barrator. Ibid.

One cannot join in an action for a vexatious suit. the injuries being separate & personal. Kirby 145.

But there may be two 1814, 5 Com. B. 5. 1 Stra 79. 2 Stra 910. Esp 537.

Whether damages may be recovered in this action against several. See two cases contrary. How can they be recovered? Esp 537. 1 Stra 79. 2 St. 910. The malice of D. enters into the consideration of damages. Esp 537. Not recoverable by one practice. N.D. 433.





Private Wrongs.

Action of Trespass

for

Injuries to Personal Property. by Mr. Gould.

Trespass, in its most extensive acceptation, at C. L. is any transgression of Law, short of treason, felony & misprision of treason or felony. When not considered as a word of technical import, it is any violation of any law. 3 B.C. 208. Butts v. Dill. 5 B. & A. 157.

The word as now used in Law, denotes in its general sense any misfeasance committed to the injury of another's person or property. Esp. 380. 5 Com. 574.

The word in its most appropriate sense imports only injuries by force, to the real or personal property of another. Esp. 380.

The Trespass now to be considered, comprises all forcible injuries to the personal property of another. Esp. 380.

The rights of personal property in possession lie to two species of injury. I. Abuse or damage, while the possession of the owner continues. II. Eviction or deprivation of possession. 3 B.C. 145.

II. ^{1st} Abuse of personal property without altering the possession. E.g. Poisoning one's cattle - killing his beasts - or doing any act, which takes away from the value of a chattel, falls under this description of injury. 3 B.C. 150. See also timber floats.

The remedy in these cases, if the act is accompanied with force, is immediately injurious, is by Trespass vi et armis. 3 B.C. 150. 5 Com. 582. 2 Role 556. C. 17. Esp. 598. If case is lost when trespass is, proper remedy judge awarded, vice versa. 6 T.R. 125. 2 Mod 131. Cro. E. 141 in 176.

Private Wrong: Action of Trespass upon Personal Property.

be positive - a misfeasance, not a nonfeasance. E.g. case of a farmer's dog, when dog is shot. But he would not have been a trespasser ab initio for refusing to pay the taxman for an entertainment. Esp 383. 5 T.R. 161. 3 Co 146. 2 Buls. 312.

So if one having taken a distress lawfully, refuses to deliver it under a sufficient amercement. 5 Com 381. 2 Roll 554. Dis-
tress of goods &c. There is injury is remedied by case. 11 Mod 12. 130.

Exception to the rule, in the case of a parson of a church who omits to return a writ. 5 T.R. 162. Tal 404. 5 Mod 632.

When the party gives the license, under which the original act is done the other can never be made a trespasser by viola-
tion. Park 191. 2 T.R. 64. 2 Roll 581. 3 Co 146. 14 Mod 96. For this I can
well punish in case of abuse of the very act, which was author-
ized by itself, yet it will not allow a party to treat that
as unlawful, which he himself made originally lawful. 5
Bac 162, pl. 22. E.g. unlawful distress or abuse by bailor.
5 Com 381. Com. Rule in Com. 381 denied 5 Bac 162, pl. 20.

If indeed bailor destroys the thing, trespass it is said to be
for he extinguishes the bailment; but is not a trespass ab
initio. 1 Com 100. 2 L.R. 502. 5 Co 13. 11 Mod 248. 5 Bac 266.

To maintain this action, plff. must have possession.
Property alone is not sufficient. Esp 383. 4 T.R. 489. E.g. Plff. let a
house & furniture to T. L. & ft. pending the lease, lived as a
tenant on the furniture, as belonging to T. L. Plff. let tres-
pass - a judge not to lie - plff. not poss. - it should have been
11 Mod 10480. & now holden that trover will not lie. 7 T.R. 9.

But constructive possession, is, against a stranger sufficient.
5 Com 577. 3. 5 Bac 164. 2 Roll 581. 5 Bac 164. 1 T.R. 1420.
4 T.R. 420. 7 T.R. 9.

Private Wrong. Action of Trespass. Possession? 944.

So generally any person having the general property may maintain an action of trespass, for a wrong to his property. 5 Bac 164. 5 Com 578. 2 Bulst 214. 2 Bulst 288. 1 Sid 438. 2 Roll 569.

The owner of cattle may maintain trespass, for a wrong done to him. 5 Com 577. 2 Roll 531. L. 25.

The general property contemplated by this rule must suppose a right, either absolute or conditional, of present possession. As in case of Bailor to keep, pawnbro. &c. It is contrary to 4 T. R. 489. 10 B. 480. 10 p 383. Suppose the case of a borrower for hire, for a certain time.

So he who has the special property in goods, may bring trespass. 5 Bac 164. 5 M. B. 89. q. loc. cit. 89. 4 Co 84. 2 Roll 569. Same generally as in trover. Bailor & Bailee may both maintain the Action. 2 Cam 47.

If bailor delivers the goods to a stranger, bailor cannot maintain trespass, tho in some cases he may trover. ante. 5 Bac 164. pl. 18, 175, 16. 30. Quia if bailor has only the bare custody, as a servant. 5 Bac 176.

If property is given to one, he may maintain trespass, before he has taken possession. 5 Bac 164. 2 Bulst 214, pl 10. For property draws a possession in Law.

If goods of testator are taken away, before the will is proved, Executor may maintain trespass, after proving the will. 5 Bac 164. 2 Bulst 288. 10 T. R. 480. He has by relation a constructive possession from testator's death; his right is from the will - not the Probate.

So legatee of specific goods may maintain trespass for taking after executor's death, tho it be before delivery to him by executor. 5 Bac 164. Action of the legatee, tho a "trespass" of

Private Wrongd. 3 Action of Trespass upon Person: Robbery.

of Testator's goods, not specific. And in the first instance, M. R. supposes that Trespass w. not lie, if the taking was before Exec. assent to the legacy. 15. R. 440.

Then trespass for goods taken by 2 belonging to 2, both should join; but the defect is curable in statement only. 16 R. 12. Sal. 32. 22 R. 334. 1 R. 31. Esp. 336. 411. Sal. 4. 2 R. § 323. Sta. 820. as robbery, grand larceny.

It seems that at C. R. trespass does not lie for an act amounting to felony, as robbery, grand larceny &c. by reason of merger. 5 Com. 382. 5 R. 15. 3 R. 176. 1 R. 21. 97. 1 Com. 130. 2 R. 190. 1 R. 378. 2 R. 100. 557. 10 R. 288. 1 R. 148. Sal. 1. 144. 4 R. 52. English authorities contradictory as to the application of this principle. No such principle here. Merger founded on forfeiture, 5 Com. 382. 2 R. 157. 2 R. 38 R. 176 argued Com. Bull. 131 I cannot understand.

If a Shff. or under Shff. takes the goods of one or 2, or more, or another Shff. liable in this action. wrong 40.

In declaring the goods must be described with convenient certainty. Esp. 405. b. "Trespass goods" or "peff's goods" not sufficient, nor cured by verdict. For one recovery, w. not be a bar to another, & do not justify. 2 R. 1410. 4 R. 2455. Sta. 837. 5 Co. 33.

But this rule applies only where the action is founded on the taking of, or injury to the goods themselves; not when y. injury is laid by way of aggravation. Then "peff's goods" generally is sufficient. e.g. Trespass for breaking & entering peff's house & "spoiling his goods", sufficient. (Esp. 406. 3 R. 122) even on special demand.

Trespass lies for breaking & entering house, & expelling peff. Expelling only aggravation, unless peff. makes a new & significant of it as a substantial trespass. (Case of novel & signm. 1 R. 305 + R. 330) 3 R. 10. 247. 1 R. 130. 555. 1 R. 211. 217. 2 R. 313. 3 R. 120. 4 R. 17.

Private Wrongs: Trespass upon Person: Property.

So, a general description is sufficient, if it is made particular by reference to other things in the declaration. Esp. 406. Eg. Several keys, for opening the doors of the House of Lords. Sal 643. 10 Mod. 114.

Trespass of a permanent nature & may be tried with a continuance. Esp. 216. 407. 2. Sal 638. 2 Ray? 239. & Lewis v. Lewis is dectus 2: 2181 217.

Saying with a continuance when the acts lie not in continuance, not cured by verdict, unless some of them lie in continuance. Esp. 408. Sal 639. Parent. 26114; page.

Plff must state possession or property & showing a right of possession, i.e. either an actual or constructive possession. Esp. 406. 383. Sal 644. "from plff's person" not sufficient. Cro. 46. 45. 11. 490. 106. 480. 2 Per. 156. Taking "hay from plff's land", not sufficient - Decisions, in these cases, not good even after verdict.

Value must be stated. Esp. 407. 2 Bac 196. 1 Sid 39. 2 Per. 230. 430. Cro. 129. 5 Com. 349. 2 Vent. 174. (Esp. 588 that value need not be alleged or proven, - ante.) Omitting an amount of value cured by verdict. Esp. 407. 5 Bac 196. Sid. 39. 4 Burr 2455. argus. 622. 129.

Pendency of another action vs. the same party or parties for the same trespass is a good plea in abatement. 5 Co. 61. 1 Com. 49. 50. 110. 1 Bac 13. Caith 96. - Issues of the other action for the same trespass is vs. a stranger. 1 Com. 50. Hob. 138. 4 Bac 48. 7. Sta 420. 5 Bac 192. pl. 15. 4 Bac 48.

Day laid not material - plff. may prove trespass at any time (not within the Stat. Persecution). Esp. 407. 321. 319. 415. Bull. 17. 2 Ray? 231. 602. 283. Cro. 32. Hob. 104. Therefore if a release is pleaded, date must traverse as to the subsequent time. 2: 415. See 5 Bac. 106. 7. Bull 38.

Private Wrongs: Action of trespass. Person: Plaintiff.

Plff. by way of aggravating damages may lay in his declaratⁿ things, for which he is not to have an action. Esp 467. 5 N. B. 196. Sal 119. 1 Stra 61. 1 Hob. 787. Du. Is it to aggravate, damⁿ? ante Assault & Battery. Esp 317. Sal 542. 5 Rep 1032.

If trespass is committed by several, plff may declare vs one or more; or all. So he may vs each one separately. 5 Bac 192. 3. Stra 420. As to severing damages see.

If on a judg^t against several, one is compelled to pay the whole, he cannot oblige the others, to contribute. rule common to all torts. Hard 164. 8 T. R. 156. Kirby 116.

But if it appears from the declaratⁿ that the Defe with another person (certain) committed the trespass; the declarⁿ is ill for not joining the latter. 5 Bac 192. 3. T. R. 1 Leon 41. Hob. 199. 1 Leon 41. Du. as to the principle. Torts being several. And Defe pleading or showing the fact, does not hurt y^e declarⁿ. Stra 420. Hob 199. - unless if the Defe is not known.

Justification must be pleaded. Esp 411. Co L. 282. Stra 61. If justification pleaded by one of several shows up for y^e whole plff. had no cause of action, judgment cannot go vs either; and if one has suffered a default, or been found guilty. e.g. a licence pleaded, or gift &c. Esp 421. 1 Stra 610. Hob. 54. 5 Rep. 1372.

Words "vi et armis" not necessary in Con. Bosworth 25. 18 L. J. In the case cited there was a special demurrer.

In Eng. "vi et armis" are words of substance. For at L. E. in the judg^t in case of forcible injuries, was a corpias pro hoc. in other plff paid a sum of money, on taking out the original & the judg^t was a misericordia. 4 Bac 11. Fine. 200. 200. 8 Co 39. In Spain all is the judg^t out. Esp 408. 5 Bac 191. 18 L. J. 196. 18 L. J. 636. Grob. 407. Grob 443. 226. 536.

Private Wrongs. 3. Actions of trespass for Personal Property.

Now the writ of *capias pro fine* is taken away by Stat. 5. W. & Mary. But the *pleff* pays a substitute or signing judgment in actions for injuries with force *vi &c*. There the *pleff* must *sign* the rule continues. 3 Bar 191. Sal 536. 3. Ray. 985. con.

To Contra. *pace* in words of substance in Eng. 3 Bar 191. 192. Esp 408. 4. R. 1598. Coath 66. Sal 536.

These defects aided by verdict & shall be amended (Esp 408. Sal 540.) by Stat. 16. 17. Car 2.

Decided in Com nearly 30 years ago, that trespass, & trespass on the case might be joined in one declaration... &c. late decision. At C. S. such a joinder w. be ill, because different judgments would be necessary. 8 Co 39.

Now, the *capias pro fine* is taken away by Stat. 5. W. & Mary; yet the general criterion has still been, the difference or sameness of the judgment. 2 Wils 320 & 321.

Case for misfeasance & negligence, may be joined with trover. 2 Wils 319. Trespass *vi &c* arms & trover not joined same. 2 Wils 320. 1 St. R. 274. In Com. the rule as to cases may be different as to the two causes of action. 2 Rev. 268. 9.

The identity or difference of the judgments, not a universal criterion. But when the judgment is general issue are the same, they may be universally joined. 1 St. R. 274. 4 St. 347. 3 Bar 191. 4 Bar 11. Coro 3. 20.

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Private Wrongs.

Action of Replevin. By M^{rs} Gould.

In Eng. Replevin is a remedy to the owner by legal process of cattle or goods distressed, 4 Bac 372. 834 346. Co. 5. 145. 4; for any cause, or security given to try the right. & to redress if judgment be against him. It is trespass is the taking of a personal chattel out of the possession of the owner down into the custody of the party injured to procure satisfaction for the wrong committed. It is the act of the party injured. ^{3 B & C} Sometimes signifies the thing taken by distress.

Replevin lies not for goods taken by a mere trespassing act. 8 Com. 2 Lev. 90. Bull 50. 3 B & C 140. post 2u Bull 52.

Writ not granted but upon security given by poss. to try the right of the distresser &c in Eng. & to redress the poss. if judgment is for distresser. 3 B & C 13. 147. Co. 145. 834 347. 3.

In Eng. if poss. replevin does not try the right (i.e. does not pursue his action) or fails in it, the poss. is to be returned to distresser, who may have a writ, de retorno habendo. Co. 145. 4 Bac 382. 372. 3. If being returned to distresser, he may keep it till tender of sufficient amends - no longer. 3 B & C 147 = 158. 8 Co 147. See 834 377.

Tender of sufficient amends before distress, makes the distress tortious. if before impounding, it makes the impounding or detainer tortious, not the taking. 8 Co 147. Bull 50 if after judgment for distresser, it makes the farther detainer unlawful, at common law. 834 382. 2 Lev 40. 3 B & C 76. 2. Note 361. & in the last case poss. may have detainer or trespass trover. 8 Co 147.

Private Wrongs;

Replevin.

When a distress is taken it is to be impounded in an inn or stable in a pound court, animals generally in pound court. No pound court here. 3 Bl. 121. Co L. 27.

In law the security is a substitute for the property replevied. It obliges the bondsmen to respond in damages made; & the property is not red. liable to the distress or to any writ. Stat. 360.

Formerly in Eng a distress being in nature of pledge it could not be sold. The distress could only keep it, as a punishment to the owner if he were defaulting. 3 Bl. 101. 13. 11 R. 388. Statutes have in a great measure remedied this inconvenience, especially in case of distress for rent, by allowing a sale in certain cases; but not in case of cattle taken damage feasant. 3 Bl. 10. 13. 14 & some other cases. There were always some exceptions to the old rule. 3 Bl. 14. 3 Co 41. 12 Mod 330. If the distress was made in the name of the king, or to enforce an amercement it c. be sold at C. Bench.

Writ of Replevin is demandable, as a matter of right. & even the rent is granted with right of distress in repleviable. 4 Bac 373. Co L. 145.

The principal cases in which distress may be taken by the Eng. Law are two. 1. In case of cattle damage feasant. 2. For non payment of rent. (The 2^d not in use here: 2 L. 891. 3 Bl. 6. 7. Co L. 46. 2 P. 364. 4 P. 355. In Eng. there are certain other cases. e.g. neglecting suit or service for amercement & tolls, poor rates &c. 3 Bl. 6. 7. Co L. 46. 2 P. 364. 4 P. 355.

In Eng. replevin may be at C. B. by writ out of Ch. or under 7th Stat. of Marlbr. by plaint. 2 P. 346. i.e. Plff's own precept on complaint made. So Plff. may order his Bailiff by writ to replevy. 2 P. 347. 4 P. 354.

Private Writings.

Replevin.

In Eng. writ of replevin lies in all cases (I believe) in which distress is taken; except when the distress is founded on a capias in witherham. This is a distress by the owner of the original distress, the latter being carried out of the County or concealed, in which case the Sheriff returns the goods to be distrainted, i.e. carries to a distance, to a place unknown.

It obtains when the original distressor having retained the goods, ut the writ of replevin, or a claim that they are his own, (which claim is decided against), conceals them or (ut supra). So if there is no such claim, but the property is concealed &c. There then can be no replevin. (35 E. 149. 11 E. 13. 69. 70. 12 E. 1475.) of the second distress, till the original distress is forth coming. When a writ de retorno &c. is awarded & the distress cannot be found, sci. fa. lies to the pledgee in the writ of replevin. 4 Bac 382. 11 E. 13. 17 E. 147. 15 E. 322. 17 E. 376. 20 E. 41.

An Eng. writ of replevin lies in other cases than those of distress; viz. in all cases in which cattle goods &c. are impounded, distrained, attached, or seized, except upon Execution, for fines or rents, or for some cause triable before the Marshal &c. Stat. C. 36. - Perhaps all the cases, not excepted in Stat. will be those only of property taken under our writ of attachment - 1. of cattle taken & damage feared. 2. of replevin in case of cattle, taken & damage feared. 2. in case of goods attached.

1st of replevin of cattle distrained, damage feared.

In this case the owner of the Cattle, has his election to bring his assumpsit or to distress & impound the cattle. But if he distrains & the distressor prosecutes his action of trespass in good faith, unless the escape was without his fault. 2 E. 41. 2. Same rule in case of the cattle dying. 3 Bac 179. 12 E. 653. 654. 12 E. 720. Stat. 248.

Private Wrongs.

Replevin.

At C.D. the proceedings in replevin were tedious, the writ must issue out of the court, the goods were thus long detained from the owner. 114 Stat. Mass. 52. Then 3. the Stat. is enabled to replevy immediately. 4 Bac 373. 3 W. 147. 58 B. 68. 9. 13 Co 31.

Analogous to taking body of a debtor, & impounding cattle. both judges. 2 Bac. 354. Demand not satisfied by death, nor by escape, unless the party impounding is in fault. So both, pledge being broken, no other remedy. 5 Bac 179. 12 Mass 663.

In Gen. when cattle taken damage feasant, are impounded, the owner not only may have replevin, but after notice, he must replevy, or aid com. them within 24 hours, or incur a forfeiture of 17 Cents per head, for every days neglect, besides paying the expenses of keeping, & those forfeitures are to be applied for payment of the damage done, & poundage. Then the surplus to be divided equally between the Town treasury, & pound keeper. (Stat. Gen. 345. 6.) to be determined, by an assize or justice, who is to issue writ therefor.

In Eng. also, owner of cattle distrained must provide them unless they are put into a pound court; then distrainer must do it. 3 W. 13. 4. 2. 47.

If the owner replevies in this case, & judge is given for him in replevin, he will recover in the action for the damage done by the cattle. 2 Sw. 91. Thereby. If exon is not discharged by jess in replevin, his bondman is liable, & this tho the body of the jess is taken in Exon, & he dies in prison, or is discharged. R. 2. 200.

Every writ of replevin for cattle taken damage feasant contains in form an action of trespass. Generally

however, plff in replevin does not expect to recover damages but appears for the purpose of having W. of damages assessed. If however the cattle were unjustly taken, plff in replevin recovers his damages.

The pound keeper has a lien on the cattle impounded for his fees in case of settlement between the parties. W. R. 22. as to this right against a replevin.

In Con. if the owner of cattle taken damage feasant is not known, a constable is to be informed, who is to post them in the town, & the two next towns. And if the owner does not appear in a certain number of days, so many, to be sold as to pay the damages, & defray the expenses, & in the mean time impounded & supports them. Stat. 345. Stuck Estrays are also to be sold, under certain restrictions, the not damage feasant.

Generally when cattle enter the ch. insufficiency of the fence of the owner of the land, no damage recoverable. But if they pass the good part of the fence, partly good & partly bad, damages are recoverable, & they may be impounded. So if the cattle are unruly. Stat. 193.

So if they enter from highway; immaterial at C. D. whether the fence is good or bad. 276. B. L. 527. because it is unlawful to permit them to go at large in highway.

But in Con. black cattle & sheep are, by usage, commonable; & tho they enter from highway, yet if the fence is insufficient, no damages. - Aliter of horses & swine entering from highway. To them the C. D. applies. Stat. Con. 193. 346. 408. But.

A Stat. in Con. enables Towns to make any cattle

Private Wrongs.

Replevin.

commonable. Stat. 414. 408. & then no difference, between entering from highway, & from an adjoining field. 2w.

For mischief done by animals, from a disposition common to the species, owner liable, without notice, or knowledge, as a bear biting, or cattle trespassing for that committed from a disposition not common, owner not liable, without science. E.g. a dog biting. Dy. 25 29. Esp 601. 2. Ray? 606. the science not traversable, i.e. by plea but must appear true, or false in evidence. 1 Rod 4. 4 Co 18. Cro E. 330. "not action on the case."

If the owner of land chase a beast damage feasant, on to the land of the owner of the beast, he is not liable for chasing. If a stranger chases, the stranger is liable to both. Latch 120. 5 Bac 172.

Districter not allowed to use a beast distrained. 3 Wl 13. Cro J. 148. He becomes a trespasser ab initio.

When there is a trial in replevin, the Def. may in then deny the taking or show his right to take. To speak only of replevin in case of beasts damage feasant. 4 Bac 388.

The general issue is "non caput." 1 Vent. 249. 4 Bac 388. Bul 54. Upon the issue claim of property cannot be given in evidence. Is it? to be proved, i.e. in Eng? Bull 54. Tal 5. 2 Ser. 92. 6 Mod 81.

Avovery is in nature also of a plea to the replevin. the replication is nature of a plea to the avowry.

In this case, both parties are actors, i.e. pless - the owner of the cattle, suing for damages, & the avowant, in Eng? for a return of the cattle, & in some cases damages. 4 Bac 373. 2 Mod 149. Cro E. 798.

Private Wrongs.

Replevin.

In Com. both claims damages only - the cattle, being here, not returned. Bull. 51.

That avowry is in nature of an action, appears from avowry right to recover judgment for return of the distress in some cases damages. 4 Bac 373. Esp 376. 7. 2 Wils 117. Sal 95. 2. 2. ff. may plead in abatement of the avowry. 4 Bac 373. 3. Avowry must not close with a verification. Cro E. 530. 2. 2. 2. Carth. 122. 4. Bac 373. 6. Mod 103. Plow 263. Ryder 148.

But the avowry is in nature of an action, one tenant in common, may it is said, avow without his fellow. Cro E. 530. 4. Bac 373. Esp 374. He must make cognizance as bailiff of the other. W. Jones 253. 2. H. Bl. 386. 1. Ho. 220. pt. 14.

Tenants in common, may have several avowries for rent, because it is in the reality. 2 H. Bl. 387. 2. Carth. 340. Sal 389. 5. 2. 2. 2. 422.

As Title to Land may come in Question in this action, it has been called (when this is the case) a real action. Now holden to be personal, as trespass de die. Ten Land cannot be recovered in it. 4 Bac 373. Finch 2316. Comb. 476. 477. 27.

In Com. if writ of replevin, in case of cattle, return of habent, is returned to a justice, & the damage depends his jurisdiction, he must dismiss the suit, I suppose. R. S. 200.

Under our Stat. if beasts taken damage feasant & impounded, & escape, the damage & poundage are recoverable by action of debt, impounder making oath, that he took them damage feasant. Stat. C. 34. b.

Now, that all distresses must be taken by law except in case of beasts, damage feasant, list they should escape. 3 H. 11. Esp 360. Co. S. 142. 161.

Private Wrongs 3

Distress

Distress for damage, fearant, must be made while the beasts are on the land. Exp 360. Co 5. 142. y Co 22. - formerly with respect to distress for rent, except that it might be taken in great suit. Now remedies by Stat. 3 B.C. 11.

As to distress for rent. Formerly the Landlord might take as large a distress, as he pleased. Tenant had no remedy. He now has by Stat. 4 Geo. 2. c. 28. a special action on the case. 3 B.C. 12. 3 B.C. 43. 1 B.C. 104. Stra 351. This is not maintainable. 1 B.C. 590. In this case, it being no more than a Co. D. except where gold or silver (being of a certain known value) were distrained. 1 B.C. 590. In other cases a special action on the case founded on the Stat. is the proper remedy.

Distress for rent is incident, of course, to right (accruing in a Co. D.), to those cases only in which the debtor, owner of the rent, has the reversion, not when he has no future interest, as in case of rent charge, as when, owner of the land conveys his whole interest reserving a rent. 2 B.C. 218. 215. Co 214. 3. Exp 355. 6. 2 B.C. 42. But he may have the right, by clause of distress at Co. D.

Now the right of distressing is by Stat 4 Geo. 2. c. 28. extended to all rents. 2 B.C. 43. 3 B.C. 6. Exp 355. 6.

In case of distress for rent, by Stat 4 Geo. 2. if the Deft in execution of a writ, previously, he recovers his costs, so much in damages as is equal to the value of the distress, if that is less than the rent due; but if the distress is equal to, or more than the rent due, he recovers in damages the amount of the rent; & in the first case, distrainor, may have a further distress. 3 B.C. 150. 1 Bull 68. 3 B.C. 16. 349. 2 B.C. 150. 36. 3 B.C. 377. 2 B.C. 116.

Private Things.

Replevin.

III. In case of personal property attached.

Replevin in this case is never an adversary suit - no hearing on the replevin writ, but on the attachment. 2 Sw. 93. Kirby. It is called a "mandatory precept" requiring the officer to redeliver the goods &c. Kirby 276.

By this writ, property is restored to the owner on his finding security to prosecute, & to answer "such damages, demands & costs" as the "adverse party shall recover". Stat. C. 380. the security to prosecute the replevin is, in this case, more matter of form.

This writ founded on good policy that the owner need not be dispossessed of his property for a long time, & as attaching is but for security, he suffers no injury. Security sufficient.

The object being to regain the property, practice is to charge no wrong, nor ~~damages~~ and damages - no pretence that the taking is illegal. 2 Sw. 93.

Decided by S. Ct. that a replevin of goods attached, sh^d. be directed to the officer who attaches them, requiring him to redeliver, (ut supra) to give notice to plaintiff attachment, & to return the writ. Kirby 276.

Replevin returned to the Ct. in which the original action is. Kirby 276. The bond is the pledge, to secure the original plaintiff, & is preserved in Ct. on file for his benefit. Bond taken (as all bonds to prosecute now are) to adverse party, Def^t in replevin. 2 Sw. 93. Stat. C. 28.

Replevying in some measure superseded by receipts. Magistrate taking the bonds acts ministerially, he is liable if bonds insufficient, (but not if the bondsman is responsible at the time, & the action may be brought against him).

Private Property

W. H. Levin.

the no previous suit has been lost agt. the pledges 1 Bul. 60.

He becomes surety in this case for the whole debt
securative, as in Eng. Shff. does, even over the amount of
the bond taken as the case may be. (vid 8 T.R. 28. 1 H. Bl. 76.
Camp 71.) 2 H. Bl. 547 (con.) 2 H. Bl. 36. Case in H. Bl. Strong
is then a similar case here, Bond in Eng. being for return
of the goods. Esp. 348. Strong 336. 4 T.R. 433. Con. 2 H. Bl. 547. The action
is Case Bull. N. 7. 60.

However doubtful whether the action in Cas. Bond
in Eng. double the value of the goods. 2 T.R. 60. 2 H. Bl. 36.

It has been a Qu. in Con. whether p'ss bond might
be taken by the Magistrate. Decided in the Ct. of Errors that
it cannot, at least that Magistrate is liable on p'ss
failure who is responsible when the bond was taken. Nov. 1835.
Suppon y. p'ss does not fail, is y. justice liable in y. first instance?

It has also been questioned whether when propy. to some
amount is attached & surplus the bondsman is liable for
more than the value of the property. No decision. Mr. R.'s opin-
ion aside from the words of the Stat. But the words of the
Stat. are explicit. As analogy to case of receipt man, who
is always liable for the whole unless he delivers the property.
Decided contra. vid. 4 T.R. 433. 2 H. Bl. 547. Esp. 348. 2 H. Bl. 36. Con.

[From analogy to the case of bail & of bonds of indemnity it
clearly appears the bondsman is liable only to the amt.
of the property attached. The analogy of the liability of a
receipt man, is also a support to the opinion that the bonds-
man is liable only to the amt. of the property attached.
But still the words of the Stat. are so express, that it is proba-
ble our leg. would make him liable to y. whole damages.]

Private Wrongs. 3

Replevin.

Questions also whether bondsman can discharge himself by surrendering the goods, after judgment in replevin? This Qu. depends in some measure (i.e. so far as it is affected by the extent of his liability) upon the former - how far he is liable - not like the case of a receipt, man - he is bound only to deliver. Not like bondsman in English replevin, who engages only for the return of the property. - (Supperenditum in Con. he cannot.)

If the property of one, is attached for the debt of another, replevin does not lie, but trespass does. & the replevin in this case is not an adversary suit, & no one can replevy, unless he is a party to the suit, & has a property in the goods.

Replevy 276. 2 Geo. 93.

So, it seems, replevin is not the proper remedy for a merely trespassing act, according to the English law, it being grounded upon a distress. Bul 53. 602. 145. Esp 346. 5 B.C. 13. 146. 7. 2 Geo. 39. Qu. Bul 52.

If cattle of a feme sole are distrained, & she marries, husband alone may replevy, for property becomes husband by intermarriage. Esp 375. 1 Geo 81. 2. Bul 53. But if wife joins it is good after verdict, for presumption will be that they were joint tenants.

Executors may replevy distress taken from testator. Esp 375. 1 Geo 81. 2. Bul 53.

If the goods of several are distrained, they cannot join in replevin, the injuries being several. Co Litt 193. Esp 379. Bul 53.

Goods distrained in a foreign country, the owner here, cannot be replevied here. Esp 372. 5 Thompt. The captives might be ransomed there.

Private Wrong.

Replevin

Replevin lies of things personal only - not of deeds
 of land. Esp. 372. 4 W. 385. 11 R. 10. 68. Replevin is founded
 "on the right i.e. I suppose, in property in the plaintiff.
 Therefore it is a good plea in abatement, or in bar that
 the property is in a stranger. Esp. 351. 2. 4 Bac 373. 2 L. v.
 92. Lamb. 44. 243. Gal 94. Different from actions of
 trespass. Bull. 53. When plaintiff "possession" is sufficient,
 for in replevin the plaintiff is in possession, till dispossession
 by replevin itself.

Private Wrongs.

Action of Trespass on the Case. 104. Gould.

Action of Trespass on the Case arising ex delicto for injuries to the Person and Personal Property.

This Action lies for wrongs not accompanied with force, as acts which tho. not forcible are injurious, and culpable neglects & omissions. Bull 74, & for consequences & injuries occasioned by acts, which are forcible. E.g. of first kind of wrongs. Trover, Malicious Prosecution, Slander, Malicious Praxis. 2^d. Neglect in a Bailor, Servant, Officer &c. E.g. of the third kind - injuries remedied by actions usually called, trespass per quod &c. 3 B.C. 122. 3. Esp. 598. 11. Mod. 180.

2 Rof. 1399. 1402. 2 B.C. 10895. 3 B.C. 153. 4. 208. 9. Esp. 545. 2 B.C. 167.

Throwing a Log into y^e. road over which one falls &c. digging a pit. Stra 636.

Actions of Trespass on the Case are generally founded on the Equity of the Stat. Westminster 2^d. 3 R. 2. H. 8. 29. 243. 3 B.C. 51. 21. Case was known at C. 3. 8. sem. 3 B.C. 123. 2 B.C. 129. 2 B.C. 445 2 R. 29. If Judge Keve says Trespass on the Case was unknown before y^e. Stat. West. 2^d. (see other title 104.)

In Con. the forms of declaring & common parlance make a distinction between actions on the Case, & actions of Trespass on the Case. e.g. Assumpsit we call an action on the Case; Trover, trespass on the Case. First class arising ex contractu, the second ex delicto. English Law knows no such distinction. Assumpsit is trespass on the Case. 3 R. 2. H. 8. 2. 245. &c. 394. 1^o. 3 B.C. 6. 208.

Pirate Wrongs. }

Trespass on the Case.

If Case is lost where trespass is the proper action - judgment arrested. 5 T.R. 125. 2 Maccl. 141. 6 A.C. 141. and 196. Reason 5 Bae 191. 3. 4 Sh. 11. 2 Jo. 506. and 2 converso.

Where there is no force in the transaction, no difficulty - case always.

When the original act, working an injury is with force, trespass next admissibles, in some cases - but others trespass on the case. Rule. If the act is immediately injurious, trespass next admissibles is the proper remedy - as battery of one's self - imprisonment - destroying property with actual force. But if the injury is consequential, trespass on the case seems to be the proper action. - as throwing a log into the highway over which one falls &c. loss of service from a battery of one's servant, Child & 3 B.C. 208. 9. 5 T.R. 125. 123. 153. 4. 5 T.R. 648. 2 B.C. 1055. 1 Com 209. 3 Newb. H.E.L. 244. 2 Wils 313. Bull. 26. 74. 2 S. Kay. 1899. 1 Str 634. 2 Burr 1114. 2 T.R. 231. 5 Kay. 467. - 2 B.C. 10. 892. In last case the action is usually called trespass & trespass laid to be the proper action. 2 & 8 W. 11. 476.

No difficulty in applying the rule - the effect need not be instantaneous to maintain trespass. When it is instantaneous, trespass only is the proper remedy.

Injuries which are not the instantaneous effect of an original force, are in some cases remedied by trespass, in others by Case. When the immediate cause of injury is but a continuance of the original force, it not being in any measure produced by the voluntary intervention of any rational agent, the author of the original force is liable in trespass. For in this case, he is the author of the whole force, the ultimate violence is his. the injury is considered

Pivate Wrongs. 3

Trespass on the Case.

considered in Law as the immediate effect of the original force. But when the original force ceases, before the injury commences (as is always the case where 2^d injury is produced by the voluntary intervention of rational agents, & in many other instances) the author of the original force is liable (when liable at all) in case only. For here the ultimate force is not his act. The injury is not considered in Law as the immediate effect of the original force (E.g. 1st. A ball shot & glances ten times & hits B. 2^d. A kicks a football, & B kicks it against C.) E.g. one strikes a Bull which after glancing 100 times hurts A's Servant. The bodily hurt is in Law, the immediate effect of the original force. For the proximate cause, or ultimate force is but a continuance of the original force, or causa causans. Servant therefore has Trespass. A's injury is not the immediate effect of 1st original force. (It is not indeed the purely physical effect, immediate or remote of the original force.) The immediate cause of the injury to A. is the causa causata, the physical hurt done to A's Servant. A's proper remedy therefore is Case. And actions by Masters in such cases always have been substantially, as on principle they ought to be, Case. (2 S. R. 167. 8. Esp 645. Sel 206.) tho they have been called trespass. S. Ray? 274. 331. 3 Wils 13. 2 S. R. 167. 2. New 1044. 7. 3 East 599. 2. N. Rep 476. that the Masters remedy is trespass.

A throws a stone which bounds once & in bounding hurts B. Here the vis imprpria continues without intermediate rational agents, & B. has Trespass. So if it bounds 1000 times. So if ^{he} throws a log into the road, & in throwing

Private Wrongs.}

Trespas for the Case.

it hit me. 5 T.R. 648. Stra 636.

(But in the case of a football, put by B.C.J. case in the remedy.) A Ball shot at a mark glances wounds trespass lies. So in the Squib Case. So in turning out a Mad ox. Cutting thorns. Rapping trees. 11 R. 467.

In these cases the injury is the immediate & physical effect of the force continued, & not aided by intervening free agents. But if a Log is thrown into the road, & it falls over it case lies. Not the effect of the original force continued. Cro. 448. 1 Com 204. 8 P. 599 Cro. 10. So, case of shot Stra 636.

1 Vent. 298. Case for riding a wild horse to which ran over p'ss. (1 Com 208.) Here I conclude the Dife was not considered as agent so far as related to the force. (2 Lev 172. see 2 B.C. 11. 899. 2 Stra. 117. Drifts Cart, he driving negligently, ran with force against p'ss horse. Case adjudged to lie. It is alluded to as the act of Dife. see Case 598. The Dilect did not describe y^e force, as the personal act of Dife. 8 T.R. 188.

If I dig a trench on my own Land, & disperse a water course from my neighbors, the injury is the physical effect of force. yet case not trespass lies. Here the proximate cause is negation, viz. failure of the stream, ergo not a continuation of force. 2 Wils 174. 13 P. 638. Stra. 5. 638. 9.

If a Servant in performing Masters business commits a direct injury with force (1 East 100) negligently, is trespass or case the proper action is Master? 1 Bos. 472. 6 T.R. 125. 3 T.R. 512. Sal. 441. 5 T.R. 649. - Case Schink - Stra. 1085. 7 T.R. 279. Burr. 2093. 2 Stra. 11. 446. Drifts Ship ran over p'ss boat with force, by negligence of Drifts pilot - Case y^e proper action. Not the personal act of Drift. See title "Master & Servant." Page

Private Wrongs 3 Trespass on the Case,

If A wilfully runs his Nipfel against B's, trespass lies, if it runs against by negligence - case. Injury immediate in both cases. It is A's act in the former case - not in the latter. 8 T. R. 188. Cases of mischief by one's Dog &c. post. 3 East 593. Negligently driving a carriage - trespass against the driver; 2 Campb. 464

If the servant does it wilfully without the master's orders, master is not liable. 1 East 106. 1 Horn 264.

In the cases put, of topping trees, cutting thorns, the force is continuous. It is one continuous act of force. Case of the Spout added. The erecting the spout does not cause the rain - not conjoined. Then the force ended before the injury took place. Putting down a head of water &c. is trespass. It is like pouring water on the plaintiff's land - one conjoined act of force.

Where one has done an injury arising in consequence of an act with force, the original act may be said to have been done &c. it admits that the action is case. It is mere description, post. 3 Burr 76. C. P. 254.

Whether the original act was lawful or not. - not the question. 2 B. & C. 892. 1.

Said that case, not trespass lies where the act is originally lawful. e.g. Spout case. 3 Burr 536 Not correct. 29 put. of cutting trees &c. 2 B. & C. 899. Meaning.

Trespass lies not, where the wrong act is not against the person. 3 B. & C. 154. 5 Com 582. 21 Nov. 558. C. 17.

This action lies for a great variety of misfeasances & nonfeasances. 1 Bac 44. 3 B. & C. 52. 122. 1 Com 132. 224. Many of them have distinct titles. Trower & assault. Slander &c.

Private Wrongs: Trespass on the Case.

A mere neglect for which this action lies on 4th ground of delictum, must be a neglect of duty, imposed or required by Law. Esp 599. [e.g. a finder of property is not bound to keep it safely - if it spoils thro neglect he is not liable. Du. / S. Kay? 417. 1 Bos C. 252. 2 E. 212.]

Thus for negligence in his office, a Shff. is liable. So are other officers, & private persons, (1 Com 206. 7. 9. 11 Mod 93.) in many cases. [It is also a Shff. w. to be liable for not selling ch. property taken by process. In Eng^d he may return that they remain on his hands, pro defectu emptoris. 2 Bos. 368. Dal. 323. 1 Bos. 1 Tul. 340.]

A person performing business for another, in the line of his profession, & doing it carefully or unskillfully, is liable in this action. But if the business was out of his profession, he is not liable for want of skill, unless in case of a special engagement, tho for negligence he is. S. Kay? 214. 2 Wils 359. Esp 601. But in case of an undertaking in Physic or Surgery, it seems, that unless y^e persons undertaking, make the practice of Physic to a common profession they are not liable, even for neglect, without a special undertaking. (3 B. C. 12. 2. 166. Est 601. 1 Com. 163.)

Folly of the Patient.

It lies in general against any one, by whose act, or culpable neglect, the health of another is impaired. e.g. Dr. lies vs. a Seller of bad wine, which has injured another's health. So for exercising a noisome trade, producing the same effect. Esp 601. 1 Bos 90. 95. 3 B. C. 12. 2. 166. 170. 9 Bos 52. 11 Mod 135. 3 Bos 182. (even if he did not know it to be bad?) 1 Com 166. 11 Mod 90. 2 Mod 5. 3 B. C. 166. Implied warranty that provisions sold are good. 10 Mod 110.

Private Wrongs. Trespass on the Case.

For mischief done in a way, as biting, if addressed
such mischief owner liable having notice, & not without
such notice. Cro. E. 330. 1 Com 208. Judgment arrested if notice
is not alleged. Stat 662. 3 Stat 12. Stat 90. Esp 601. 2. Under
our Stat. notice not necessary. Stat. 208.

For injury done by animals *force majeure*, as bears
&c. without notice (2 S. Ray? 686. 1 Com 208. Cro. E. 254. —
(2 S. Ray? 109. tho the injury be different as to the object from
what owner had notice of.) Stat 12. 64 or 1264 Stat. 662. /
Scienter not traversable (1 Com 208. 4 Co 18. 1 Hol. 4. "Sciens"
not being a direct allegation. (on the ground of negligence.
1 Com 208.

If A's timber floats on B's property B. has case. Suppose
pose (2 H. Bl. 258. Esp 639. He lies for a disturbance, i.e. his
during one from the free enjoyment of his right of some
kind - generally an incorporeal right (3 Bl. 236. 241.
1 Com 199. 9 Co 112. 3 Lev. 266. Cro. E. 345. Vent 278. 2 H. 186.
2 H. 104. 106. 109.) E.g. obstructing a right of way &c. divert-
ing watercourse &c. Stra. 5. 638.

For an escape, either on misfeasance or final process.
this action lies vs. y^e Sheriff. (2 Bac 245. 1 Show. 176. Now
by Stat. Westminster 2. 1 Rich. 2. Debt lies vs. him for
escape under final process. But case still lies in both
instances. At C. Law, the only action vs. Sheriff is either case-
was trespass on the case. 2 Bac 245. 1 Show 176. Esp 609. Cro.
E. 17. 2 Stra 873. When debt is lost, the jury cannot give
less than the whole, p. 9. 2 Bl. 1048. Also in case. Esp 609. 10. 2 H. 126.

When the process under which one is arrested is void, no action for escape
lies vs. Sheriff. Deu. of erroneous only. Esp 608. 9. Stat. 273. Cro. E. 188. 576. Cardh. 148.
Esp 609.

Private Wrongs: 3

Trespass on the Case

The nonfeasance of an under Shff. Shff. himself only liable. Secus in Com. for misfeasance. But both he & under Shff. liable. e.g. voluntary escape. Emburying a writ. 100. 100. 175. Sal 18. 2 on 40. Corp 403. 2 Mod 32.

If a Shff. having arrested one on mesne process, refuse to take sufficient bail, when tendered, he is liable in case, but not in trespass. not a trespasser ab initio, the abuse of the authority of Law being negative. Cro C. 141. out 140. Stra 23. No. 8. 1 Bac 206. 3 Wils 313. 2 Mod 31. 8 Co 146. b. 1 Leon 189. 1 Leon 489. 5 Com 582. 2 Roll 561. 2.

The action lies also vs. rescuers of one taken on mesne process in favor of the original Shff. (Bull 62. 6 Mod 211. Cro C. 77. No. 6. 104. trespass vi et armis) Jury may give the whole, &c. or 1/2. Expedient to prove the original D. C. insolvent, or out of reach. Bull 62. Esp. 637.

So it lies for rescue of one taken by final process in favor of original Shff. (Esp. 610. Cro C. 77. or 109. Heat. 98. 5 Com 438) Proceeding vs. rescuers, discharge Shff. according to Esp. 610. So in this case in favor of the Shff. Heat. 98. 4 Bac 399.

It lies for Shff. vs. a prisoner escaping either on mesne or final process. (Esp. 612) & that, tho the Shff. himself has not been sued. Esp. 613. Cro C. 53. So vs. the under Shff. in favor of the Shff. & com. (Esp. 613) but not in favor of the party, unless the escape be voluntary, &c. &c. Cro C.

But the under officer cannot maintain the action vs. the party escaping even tho the Shff. has recovered vs. him for underofficing for he is not liable to the Shff. by law but by contract. Esp. 613 Cro C. 349. The injury is to Shff. & party, not to the under Shff. Quia in Com.?

Private Wrongs. } Trespass on the Case.

Attorneys liable to this action for neglect, or misconduct, injuring their clients. Esp 617. 2 Wils 325. 4 Burr 2186. Sal. 86.

Attorneys are sometimes liable too, to the adverse party, for dishonest practices. Esp 618. E.g. an Attorney knowingly took judgment for a wife, after the original plaintiff had been non prosequi. 2 Wils. 325. Case of the City of London, 125. 3 Wils 377. 3 Bl. 165. 1 Mod 209.

He lies vs. Justices of peace, for refusing to do their duty. E.g. denying bail. refusing to authenticate instruments, which require his signature: as writs, depositions &c. Esp 618. 1 Leon 323. 1 Hawk 96. 1 Hal. 97.

He lies not vs. a person who has sued out a writ, for not countermanding it on settlement, unless malice is proved. 1 Bos & Pul. 388. 2 Wils 302. No legal duty.

He lies for breach of trust in Bailiffs. Esp 618. 2 S. Ray? 909. (Note tillis trover & bailment.)

This action lies, on the ground of negligence, in all cases of Bailment, when the property is injured for the want of that degree of care, which according to the nature of the business the owner requires (or which is expressly stipulated for. 1 Com 208. 209. 2 Co Sit 89. 4 Co 83. Sal. 26. Com R. 133. 2 S. Ray. 900. See Title Bailment Esp 618.

He lies vs. carriers or master of vessels, for goods lost, or injured thro negligence &c. Esp 623. Sal. 440.

But the owners of said, it is said, must all be joined, as the right of action is quasi ex contractu. 3 Sal 203. 5 T. R. 651. Con. What the case in Sal. was treated as an action on contract. But if one is sued alone, he must plead it in abatement. Esp 623. 5 Burr 2611. 3 Sal. 203. 440. Con.

Private Wrongs. } These pass on the Case.

Post masters not liable for Letters lost, or notes or other
lost, thro' the fault of subordinate officers. Esp 624. Sal 7. Comf
724. The officer is for intelligence, not insurance. & that
of responsibility if any. no contract. no hire, it's to him by pl^{ty}.

But for actual fault of his own, Post master is li-
able. So are the under officers. Comp 765. arg. Sedans p^{ty}. 3 Wil 443.

Innkeepers liable for all property of their guests lost
for want of that degree of care which the law requires of
them. 3 Bac 179. Palm 314. 2 Kth 345. Bull 73. 8 Co 32. 1 Com 210.
Esp 626. 3 BE. 165. 6. Dyer 266. Prop. 178. Jones 2. Bail^{ty}. 135. & not lia-
ble for Goods stolen by guests Servant or companion, or
taken by public enemies. See Bailment.

No Subject innkeeper for goods stolen to pl^{ty} must have
been a Traveller, & a guest receives as a guest. Esp 626.
3 BE. 273. 1 Co. 76. A night's procuring lodging is not
a guest within this rule. 8 Co 32. Esp 626.

Innkeeper not chargeable as such unless he receives
profit from the guest or his goods. Esp 627. Ego if the
guest goes away & leaves his goods, he is not liable. Cro. 108.
168. 9. & still if he leaves his horse, for this is a profit
tho' the owner is absent. Esp 627. Sal 388. Tithes innk^{ty} & Bail^{ty}.

So he is liable for dead goods, if the owner at once
is but temporary. & he is still a guest. E.g. going out in the
morning on business, returning before night. Esp 627. Cro. 189.

Sticks & wth pane, memory no excuse for the inn-
keeper. Esp 628. Cro. 62. 2.

Innkeepers not liable for injuries to the person of his
guest by third persons, as assault & battery. Esp 628. 8 Co 32.

Innkeepers liable for not receiving guests, unless

Private Writings: Trespass on the Case.

he has good reason to refuse. So against a common carrier for refusing to carry. 3 Bl. 116. Thair 163. 2 Thom 327. 1 Mac 344. 366. 180. 182. 1 Bull 70. 9 Co. 87. 10 yor 158.

The action lies for deceit in sales - as false warranty or false affirmation. (Esp 629.) e.g. affirming rent to be more than it was. Sal. 211. warranting goods to be of such a value &c. 1 Com 166. 7. 1 Roll 90. 4 yor 20. Esp 629. Cro. 4. Du as to fraud in the sale of real estate. 2 Ray 128. Co Lit 384. no. 1 Bond 6. 366. 2 Cairns R. 193. Cruise, tit. 38. c. 5. § 57.

Does not lie, to vendor, for false affirmation, when vendor has been guilty of neglect. So if vendor might easily have learnt the true value &c. E.g. vendor affirming that H. H. would give 100 L. So if the defects are visible a general warranty extends not to them. - Esp 629. 630. S. Ray? 1118. 1 Bond 6. 110. Finch L. 289. 1 Sal 24.

Du. Will not a special warranty subject in this case? Esp 630. 1 Com 170. 3 Bl 165. (General warranty of a horse holder good after verdict, tho he had but one eye. Sal 211.

So it lies for artfully disguising known defects. Esp 632. 2 Roll. R. 5.

So when vendor practices fraud by a false affirmation in respect of his title to the goods sold. Scin in this case said to be necessary, i.e. when fraud is the gist, & science not traversable in pleading. Bull 30. For the Law vide Esp 632. 1 Com. 171. Att or Att 91. Earth 90. 3 T. R. 57. 1 Bond 6. 109. 373. Cro. 474. 1 Thom 63. 68. Sal. 210. S. Ray? 593. Bull 30.

So it lies for injuries occasioned by any false affirmation made to defraud, tho the person making it has no intention in the fraud. 3 T. R. 51. 1 Com 167. So for injuries done

Private Mions, Crespo son the case.

by cheating or false pretences, &c., also his personation
L^o 10; 633, & 60. 583. Mac E. 40, 1810 258. Watt 32.

If I in a wrongful act make an innocent person liable over to a 3^d person, I am liable to the owner. e.g. I chase off cattle on to B's land, & thus subject it to the damages. I am liable to him for the fraud. Nov. fraud. Com. 325. a C. 325; 11 Co. 100. 11 Co. 34. Ill 3, 2 Str. 232.

When a public right is obstructed or violated to the in-
jury of an individual, he may maintain the action
Esp. 004. But he must state & show special damages e.g.
W. H. as an inhabitant of a certain place, had a right to
pass a ferry, & c. & c. - Ferryman refused to carry him.
He lost his action stating the common right, but not
laying the special dan. ? action lay not. 12, 560 72. 3.
Carr 193. Act of a public nuisance, occasioning private dan & ag.

So it lies for injury received from nuisance in general.
e.g. obstructing ancient light. 6058, 3 B. & 116. 1402 239.
But said that it must have stood time in memorial.
40 p. 170. 6058. 118. Sal 430. 6058 116. Wilmet, J. had 40 years
superficial. perhaps 20. 6058. "Presumption of agreement."
2nd 170. note 1 B. & 116. 400.

If a man having built a house on his own land, sells it, neither he nor any person claiming under him, may erect any building which will stop its lights. It would be an injury or derogation of his own grant. 23p 626. 122. 1 Con 214, 122 & 237. 239. - the 1st first is not an easement.

But obstructing a prospect is not actionable - matter of pleasure. 3 Bl. 217. 4 Co. 38. Esp. 630.

Private Wrongs - Trespass on the Land.

A house built near a Street, is, on the street side immediately entitled to the privileges of an ancient messuage. *Symb. Esp 636* e.g. action lies for raising y^e stues so as to obstruct the windows. *3 Will 461. 2 B & W. 326.* Builder not foolish or improvident in this case, as when he builds by another's land.

The recovery of damages for a nuisance is no bar to another. *Esp 637. Cro E. 141. 2 Leon 103.* Every continuance of it, is a new wrong.

So the author of a nuisance does not discharge himself by leasing or assigning, from actions for injuries occurring after leasing &c. *Sal 460. Cro E. 373. Esp 637.*

So too in the last case the action lies to assignees or lessee, when the continuance occasions a new nuisance. *Esp 637. Cro E. 373. 553. Wy. 250.* Sues where the whole injury is done by the first erection.

For obstructing lights, action lies both in favor of lessee for years, or reversions. for it is an injury both to the inheritance & present enjoyment. *Esp 637. 4 Mod 141. Cro E. 325. m 237.*

So this action lies for overhanging plf's house, or land, so as to cast water upon it. *3 B & W. 216. F. & L. 184. 1 Mod 107. 1 Com 213 or 23. 2 Mod 140. 5 Co 101. Esp 637. 1 Stra 634. 1 Com 210.* So for erecting a spout, &c. *Stra. 634.*

So for erecting a manufacture &c. the vapours of which injures plf's herbage &c. *Esp 638. 1 Roll 29. Cro E. 19. 3 B & W. 217.* as in polluting house. So for infecting the air about one's house, in any way so as to render it unhealthy. *Esp 637. 4 Co 59. 1 Com 214. 2 Roll 141.*

Private Wrongs, Trespass on the Case.

Injuries affecting persons, as standing in the relations to others of husband, parent, or master, have been treated under the title of "domestic relations." Esp 644. 645. 646.

Husband, Bull 78. Cro. J. 501. 538. Parent. 1104. 18. 3 Bur 1878. 2 D. R. 166. L. Ray? 1032. - Master & Serv 169. H. N. B. 340. 2 Ser 68. Comp 64. 2 D. R. 387. 3 Bur 1345.

The actions brought in these cases have been in form *trespass vi et armis*, but they are substantially actions on the case. Esp 645. 2 D. R. 167. Stat 206. L. Ray? 1032.

For other personal injuries: If a legal voter, tender, or vote, & the returning officer refuses to accept it, case lies vs him. Esp 647. Sal. 19. 3 Talk 17. (at C. L.) So a candidate for an election office may have this action, vs y^e returning officer, if the latter refuses to take or count his votes. Esp 646. 2 Vent. 25. 10 Bur 206. 2 Ser 30. 3 Keb. 26. 32.

So returning officer is liable to this action on favor of the candidate, for making a false return of the votes, at an election. - Esp 647. 11 Co 99. These are rules of Com. Law.

But holden that it lies not for a false return of a member of parliament, unless the right is determined in Parliament in favor of plff. or cannot be determined as in case of dissolution. Sal. 562. 6. Mo 45. 49. 1204. 127. 220. Esp 647. Mo 67. 2 y 275. These are rules of C. Law. Stat. on this subject on Eng. giving double Dam^s. 7. 8. Will^m 3. & Costs.

So against an officer for making a false return to a manumission it lies. Esp 643. Bull 62. 3 B. C. 111. Post 33. 1.

So at C. L. is without Stat. or y^e subject an author may maintain this action vs such as publish his works without his permission. 4 Burr. 2303.

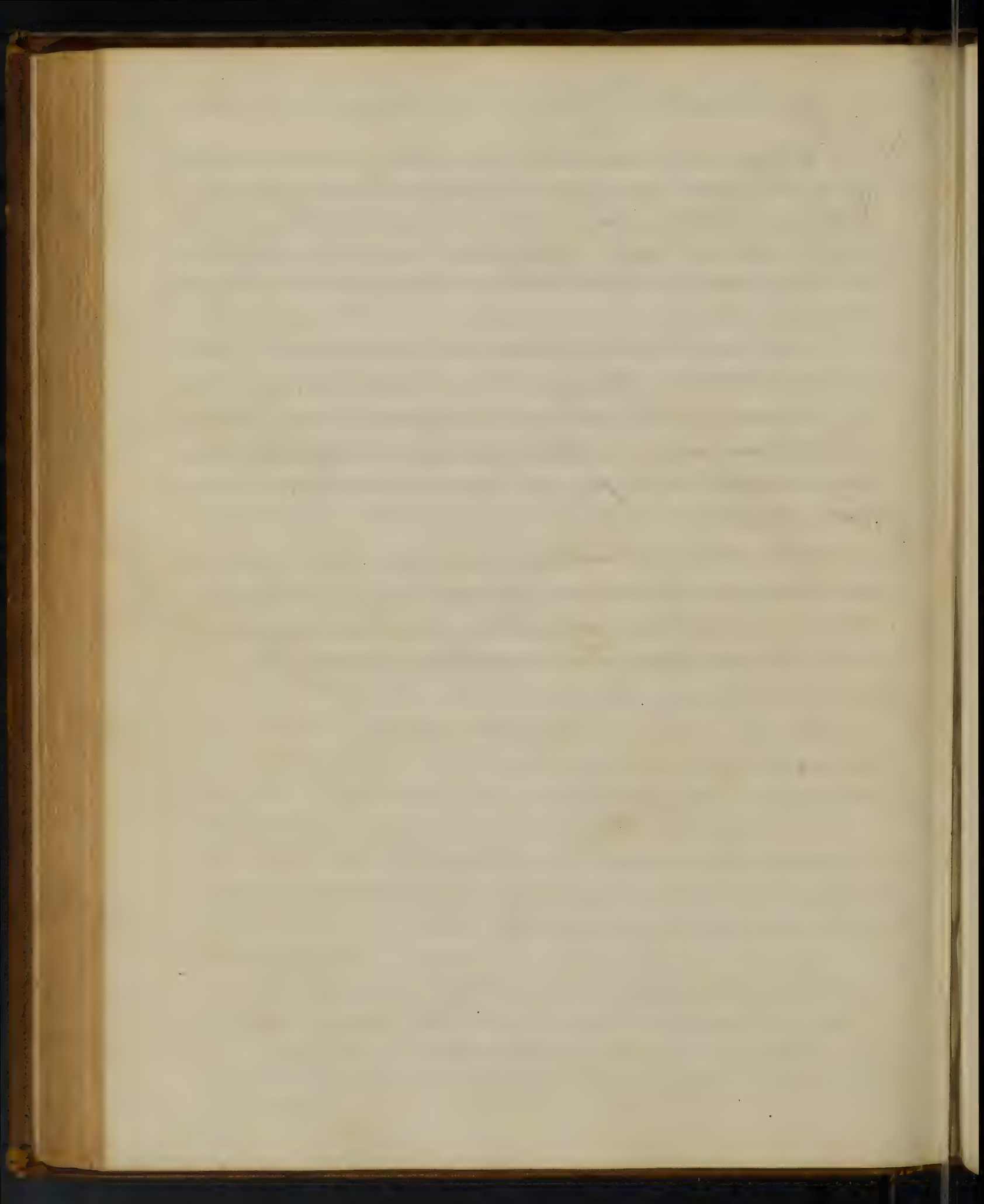
Private Wrong.

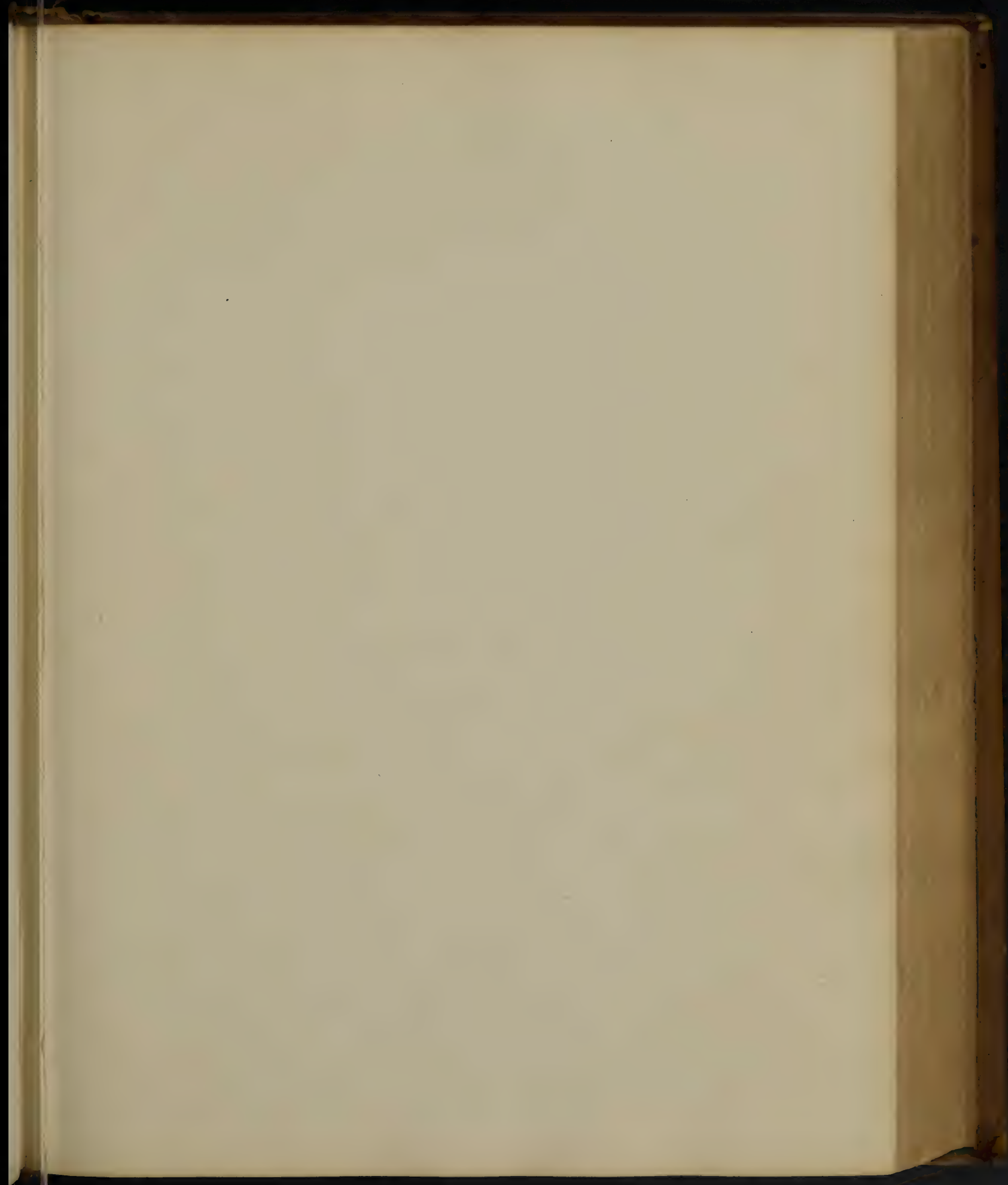
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Trespass on the Case.

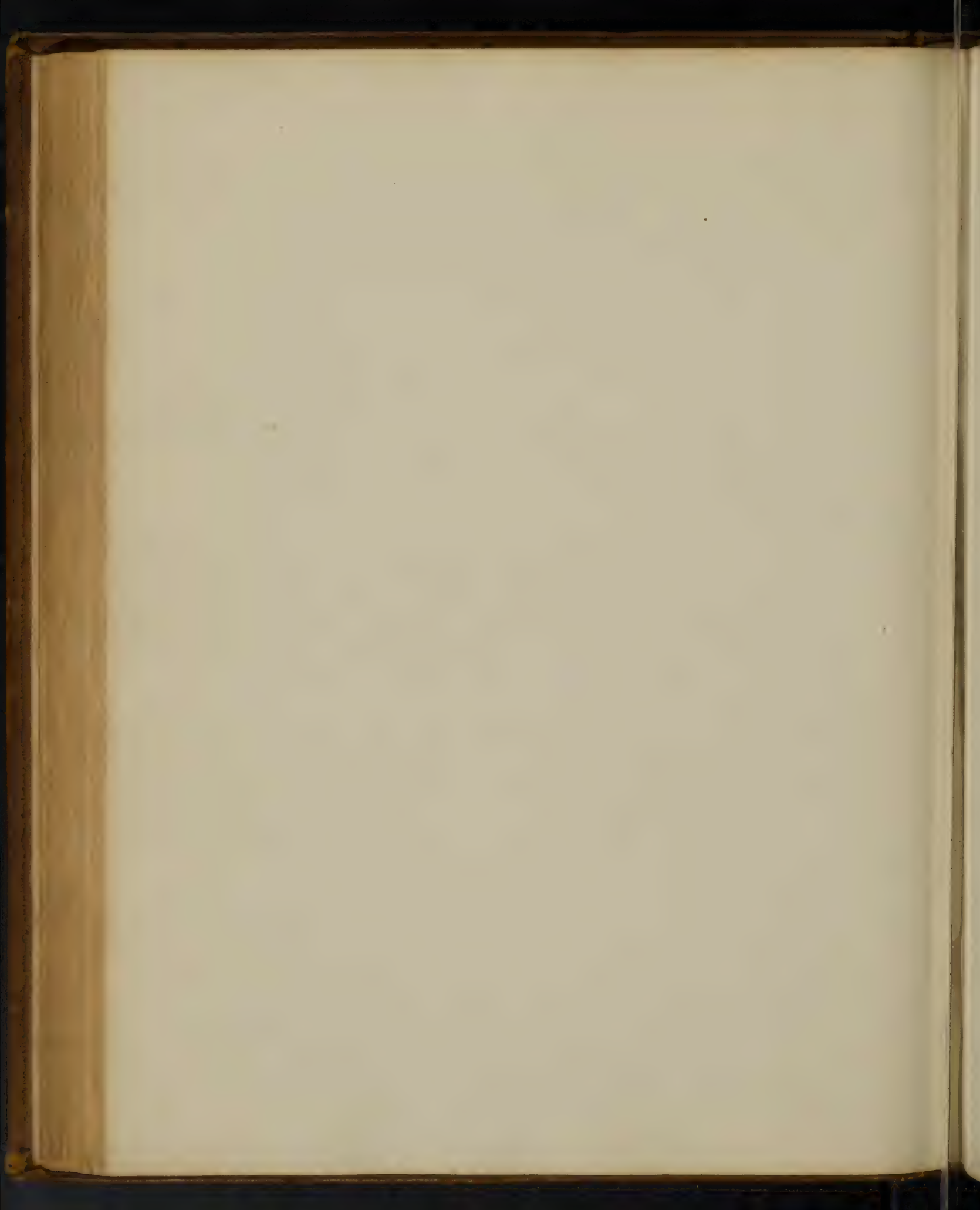
Any person employing another is answerable for his misconduct, or neglect, in doing the business, and is then (or) liable in this action, i.e. when the injury is remediable by case - otherwise he is liable in trespass, or any action adapted to the injury. 2 Rep 500. 2 Wms 729. Sal 441. Sta 1082.

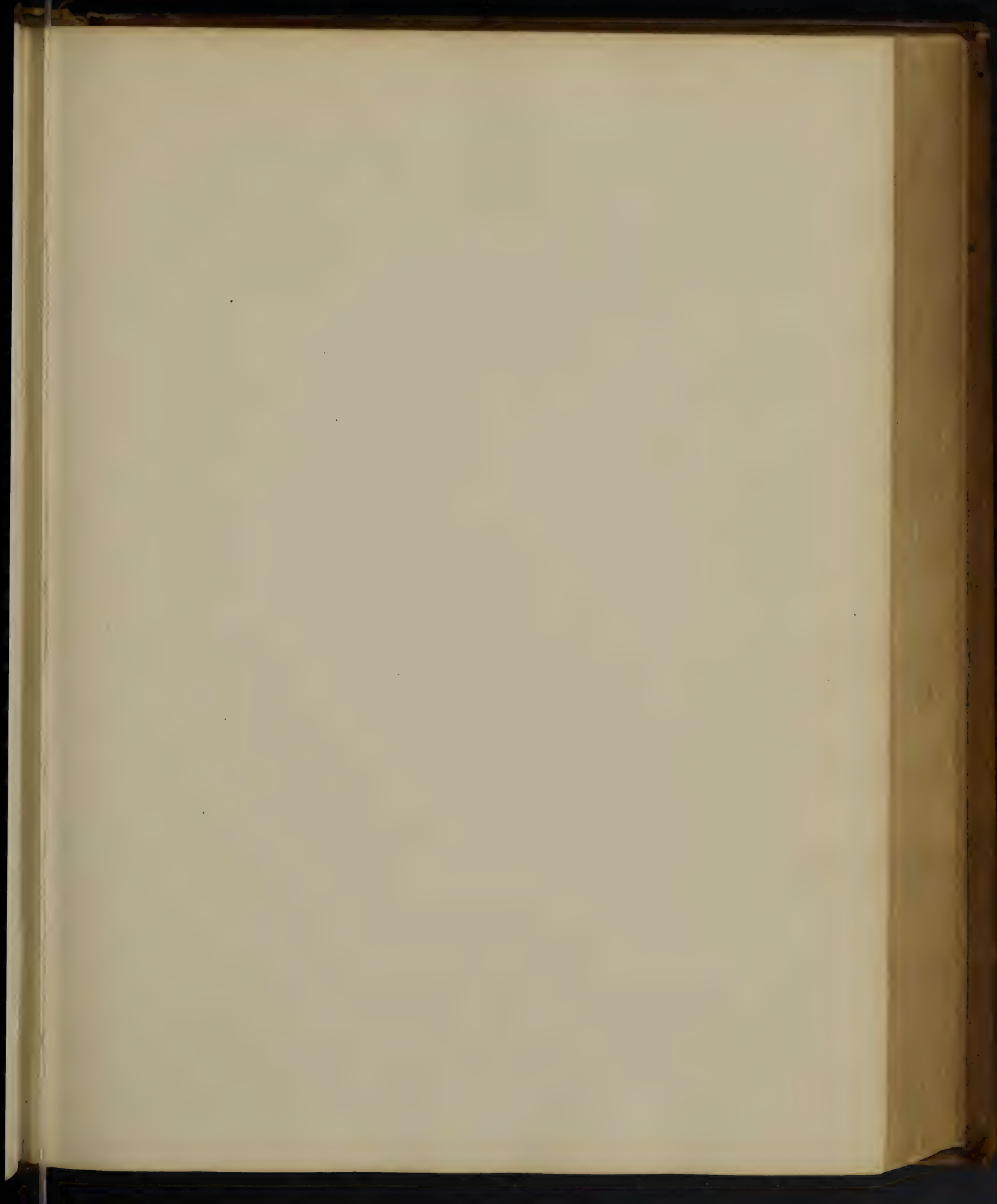
It lies for obstructing process. e.g. if an officer is prevented by a stranger from executing a process, as by removing the goods of the original deft. or locking the original defts doors, case lies for [the officer or] the deft. in the process. Case in N. H. City. See Cr. & 408. 5 Co 93.^o

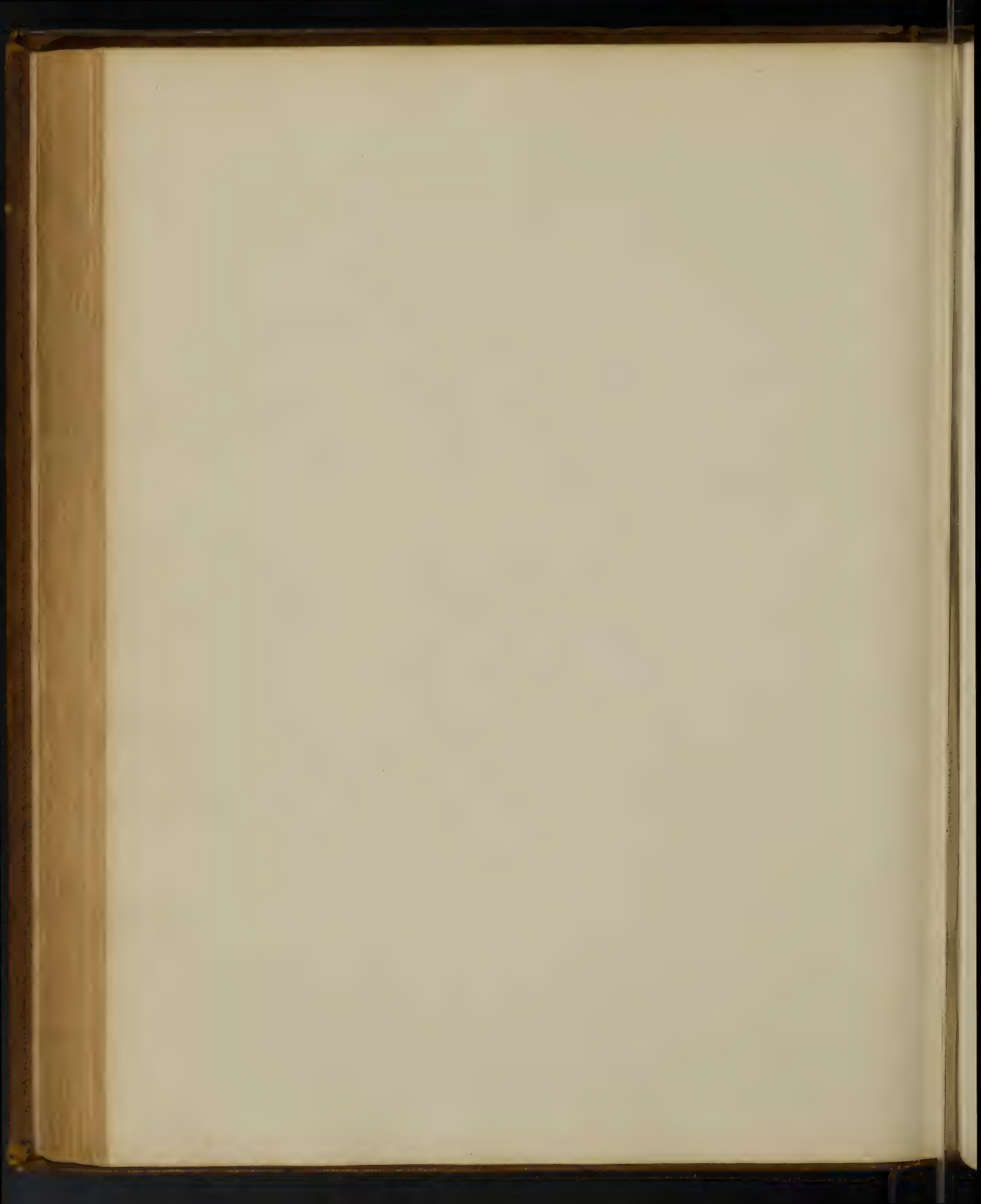
In declaring in Case no precise form of words necessary, as there are in specific or formal actions. Till 16. 173. 12. 12. 541. argues. As to the actions per quod - vide "Baron & Feme", "Parent & Child", "Master & Servant".

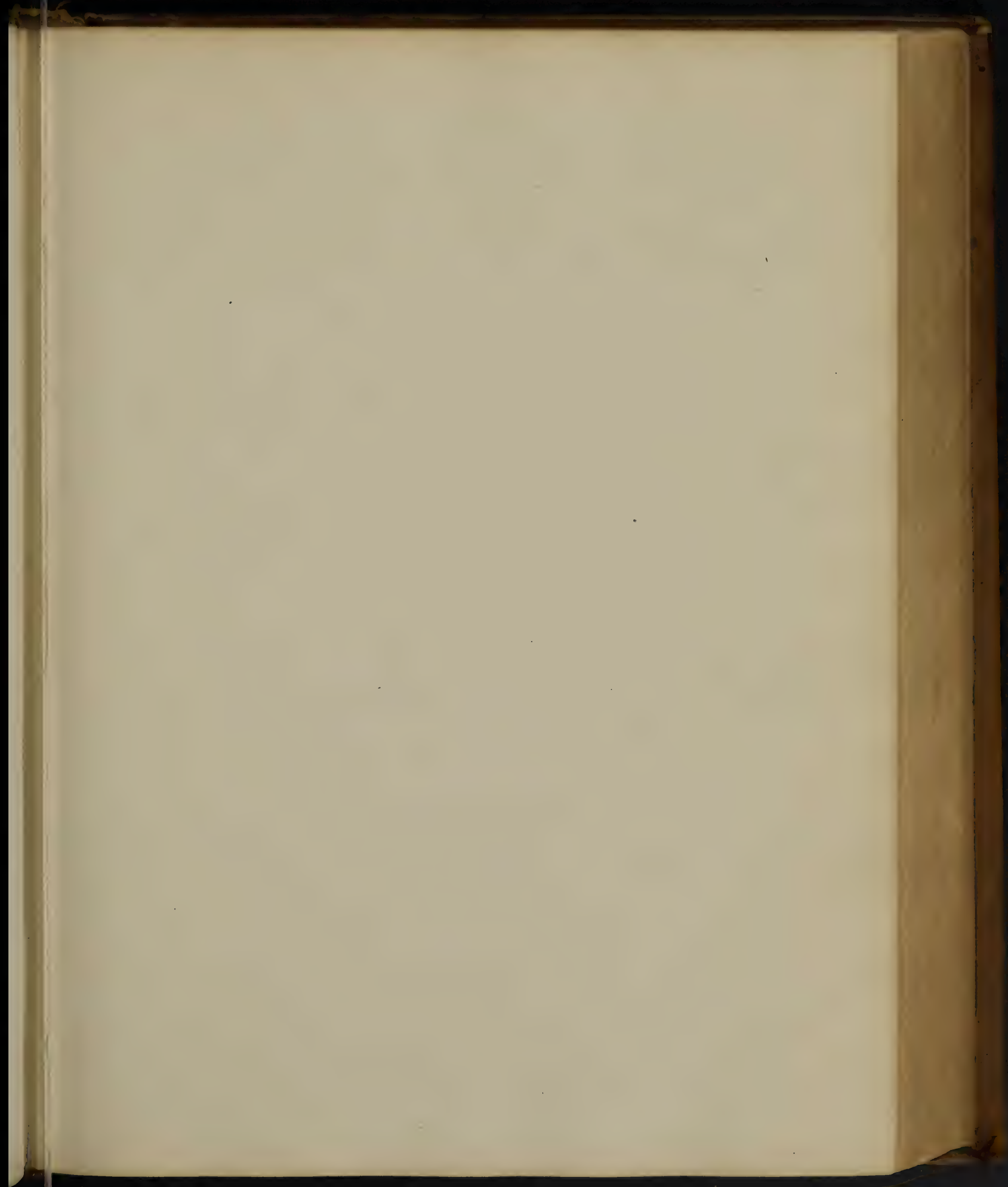


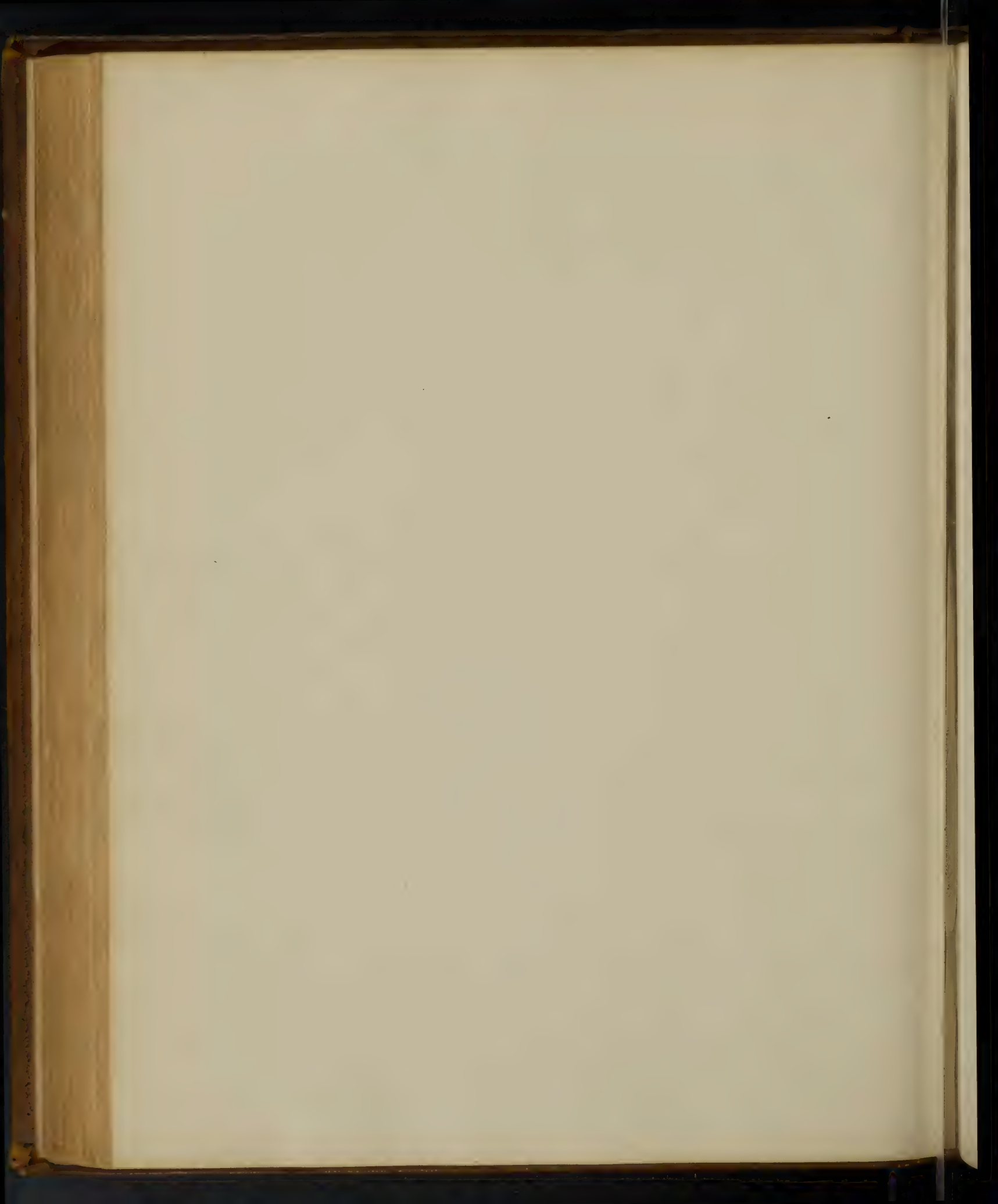


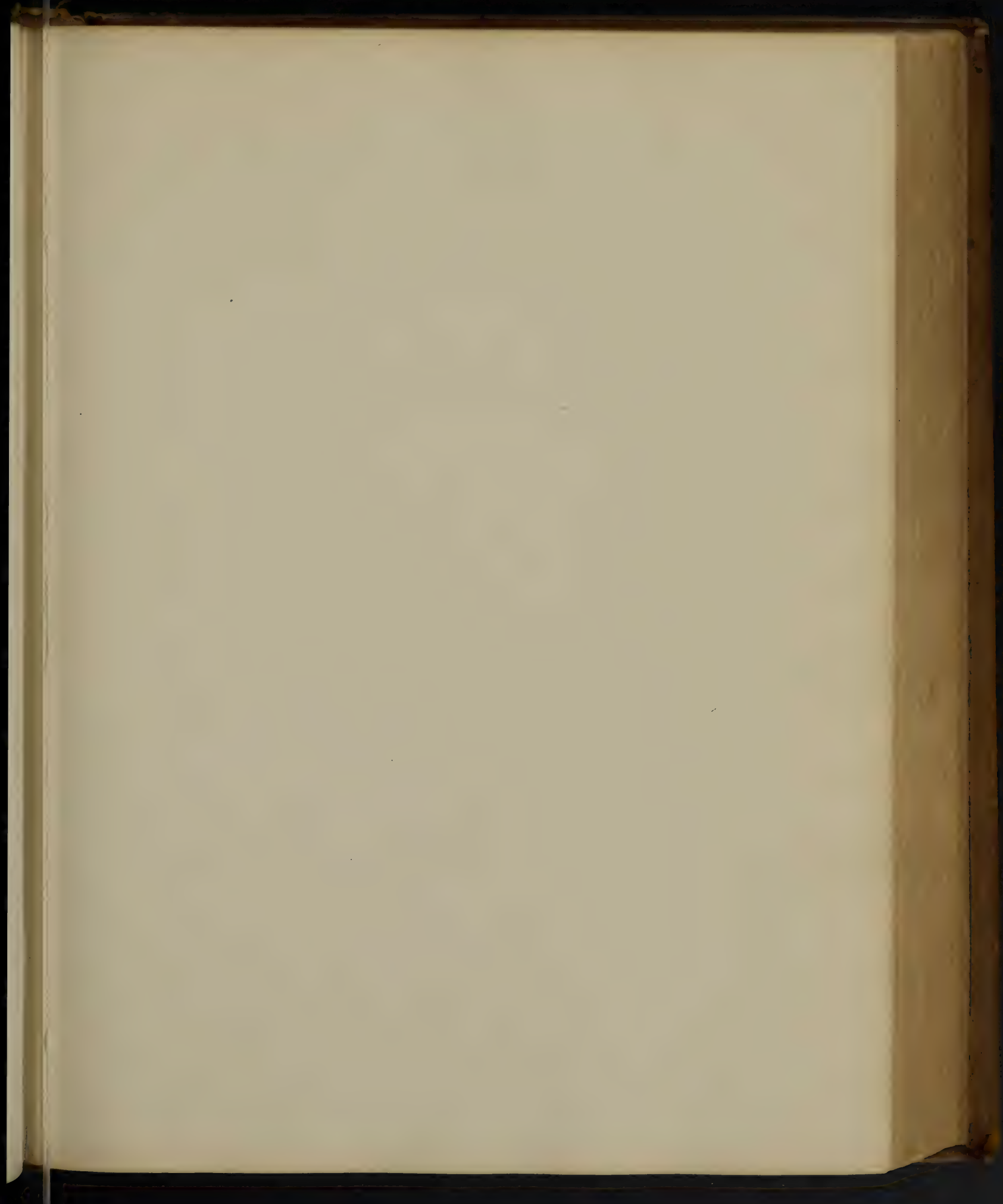


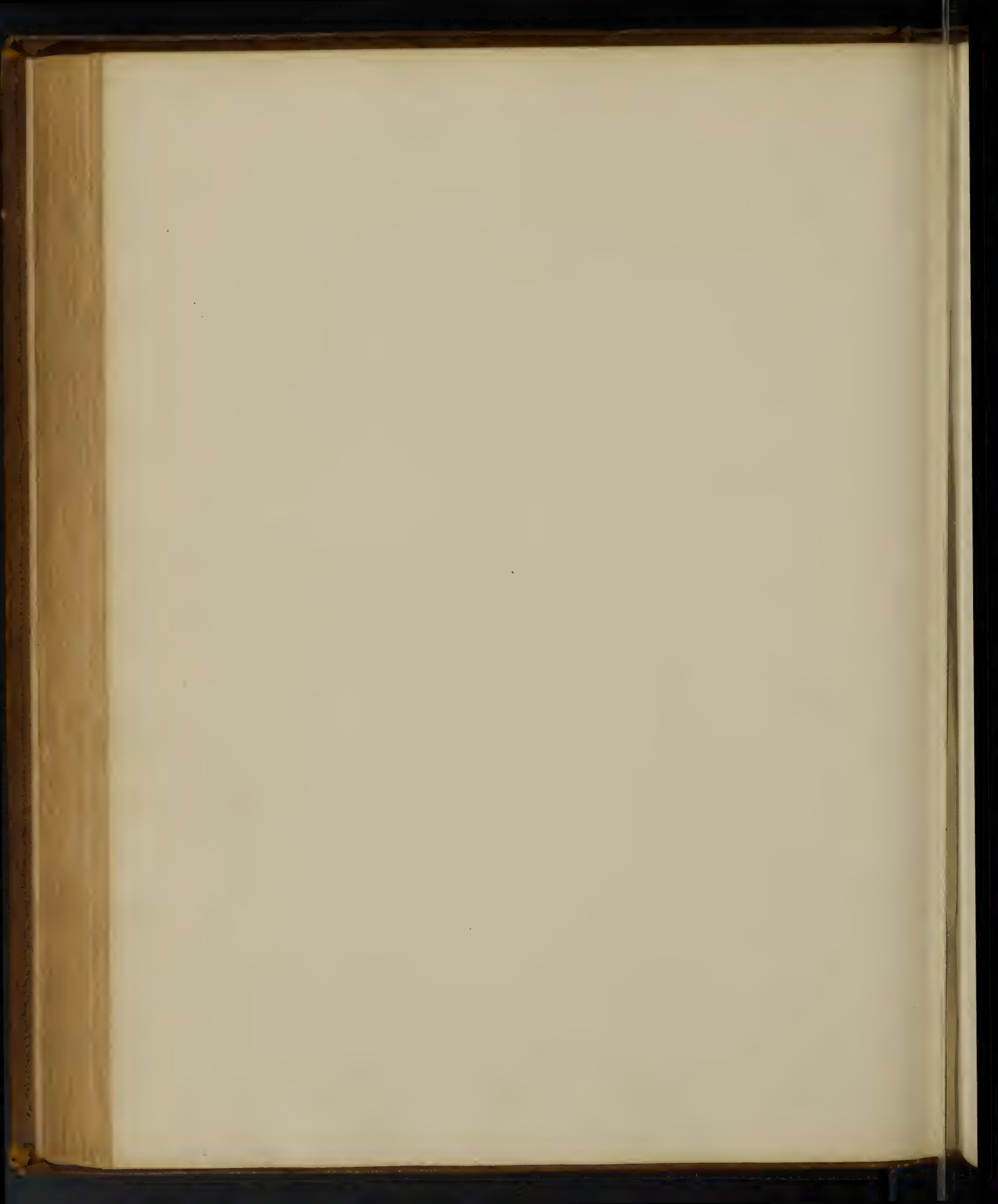


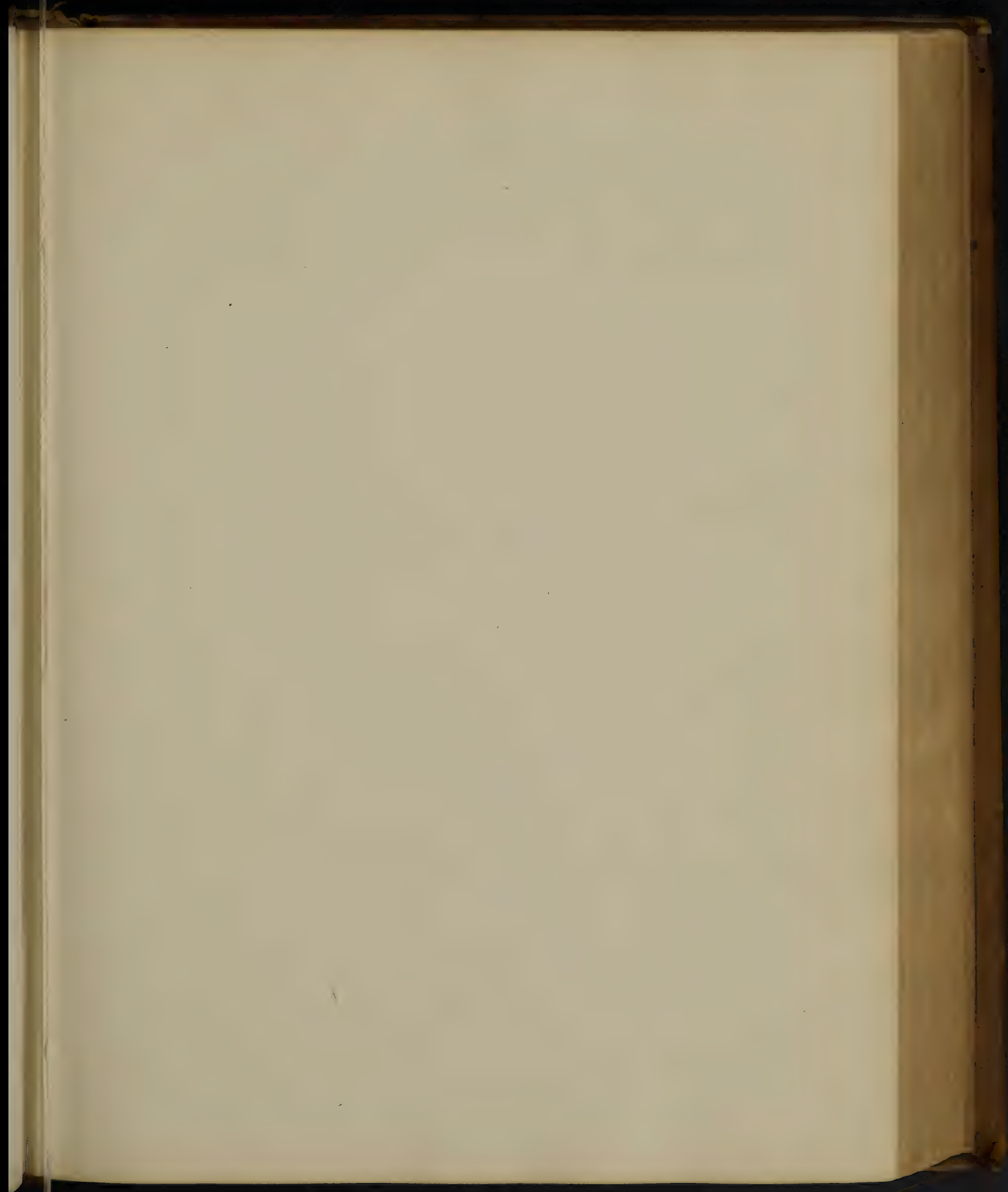


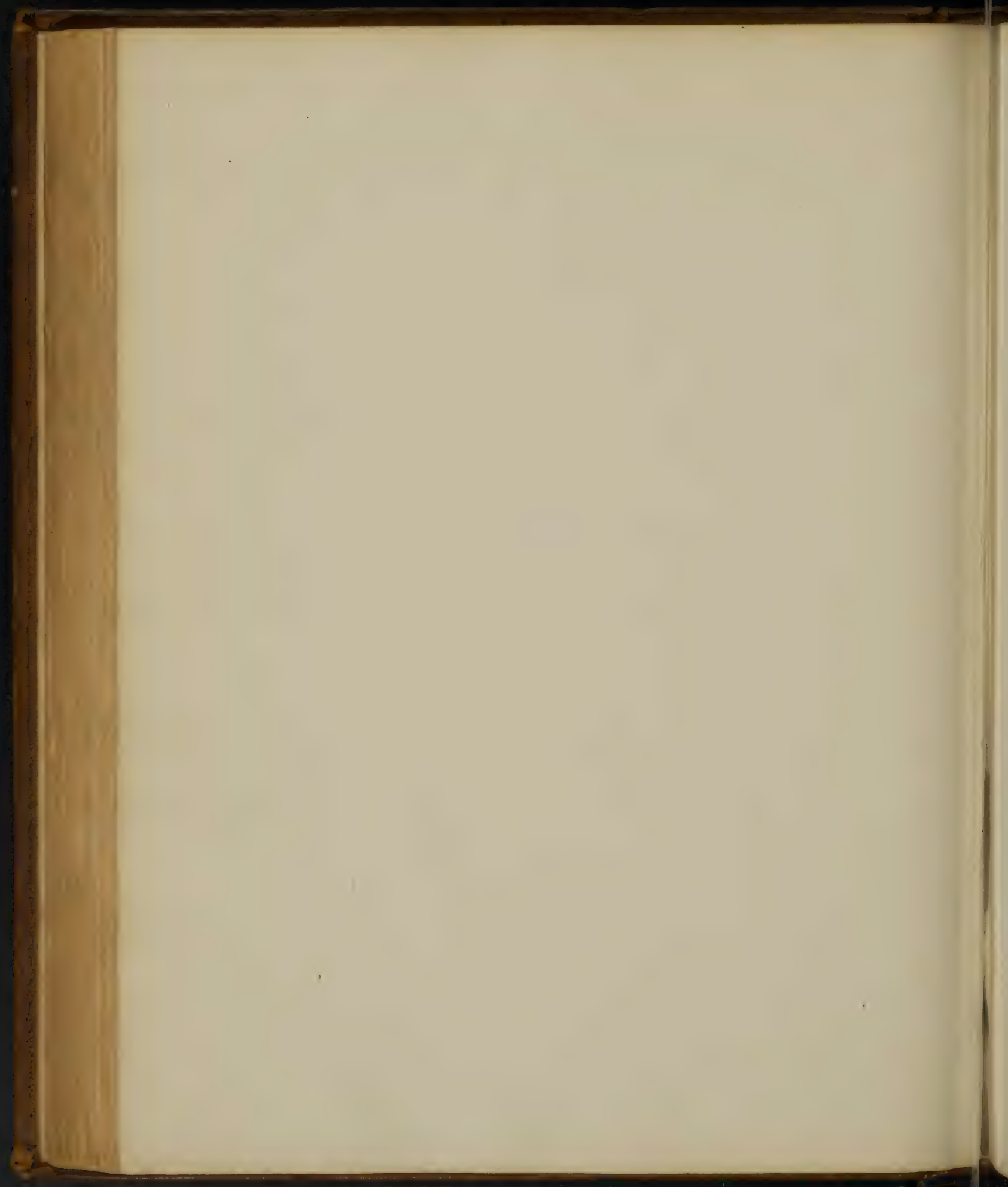


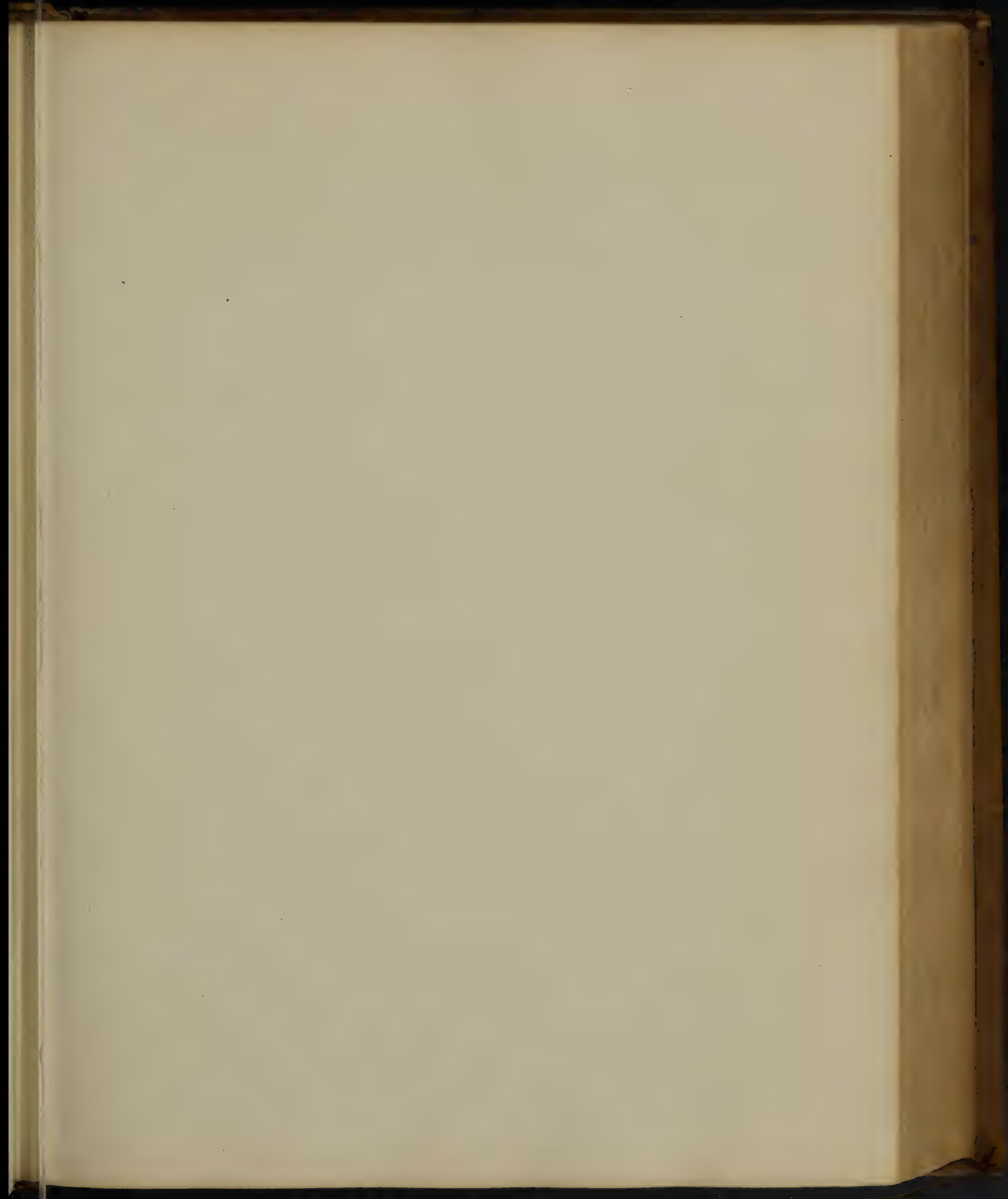


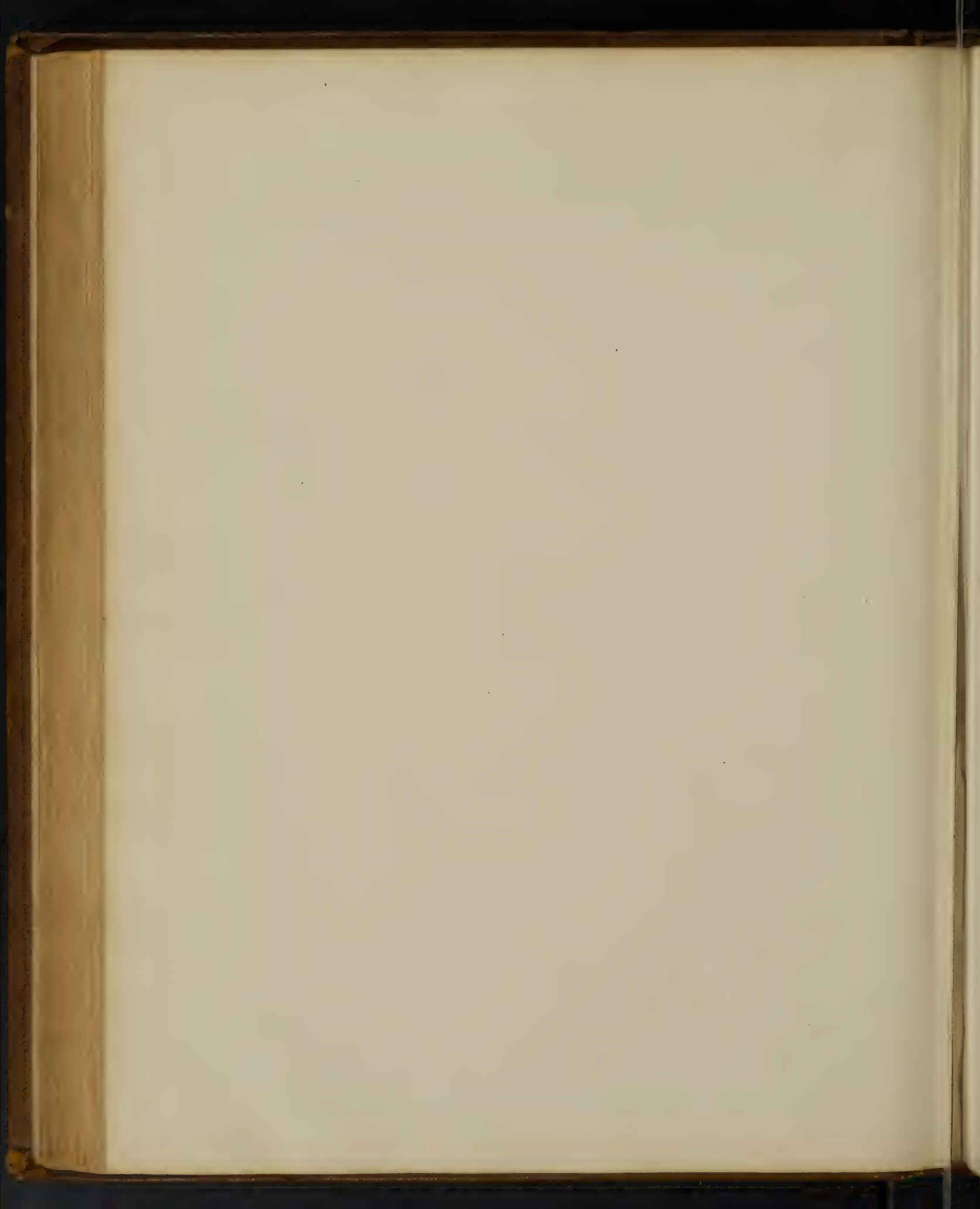


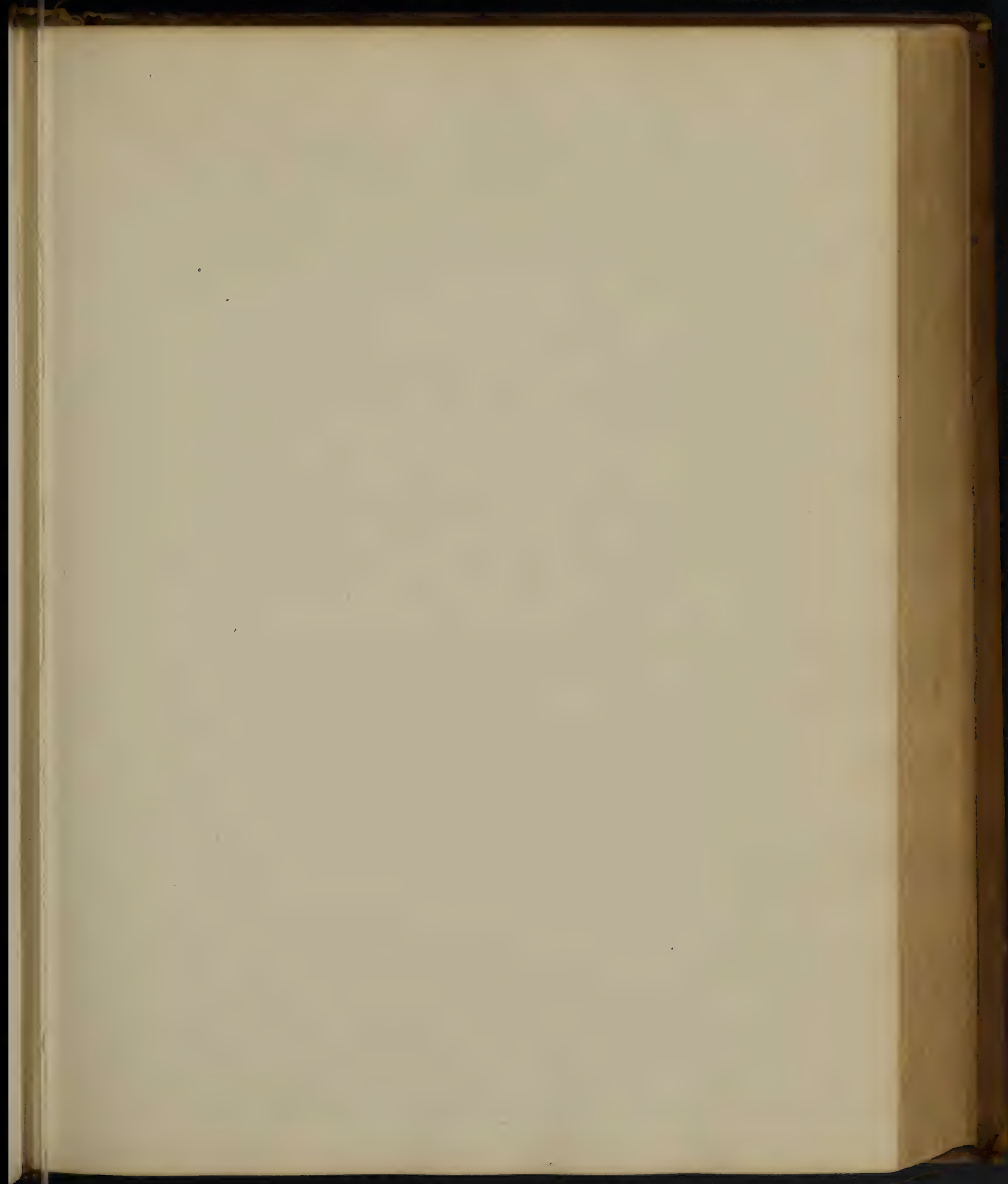




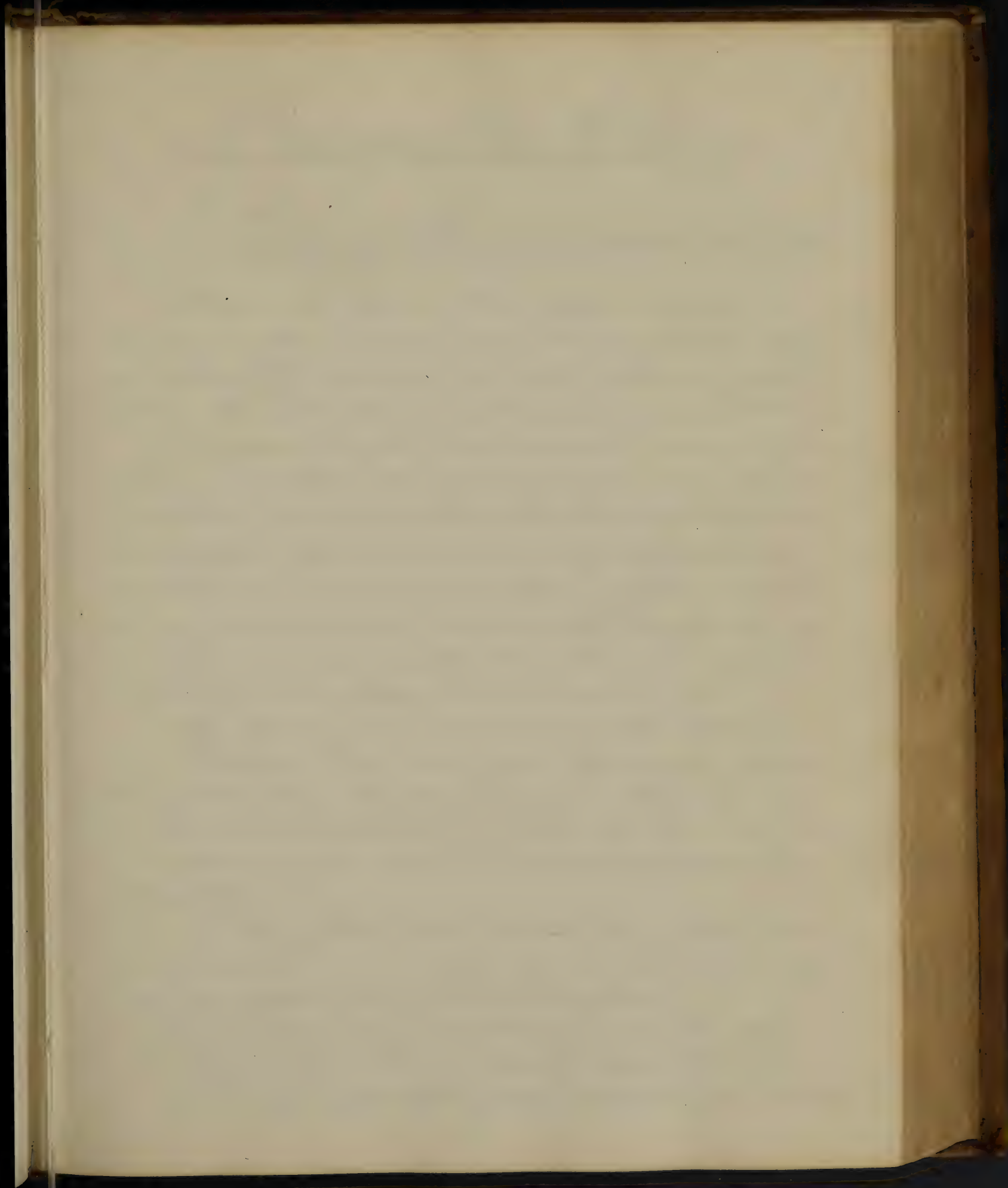


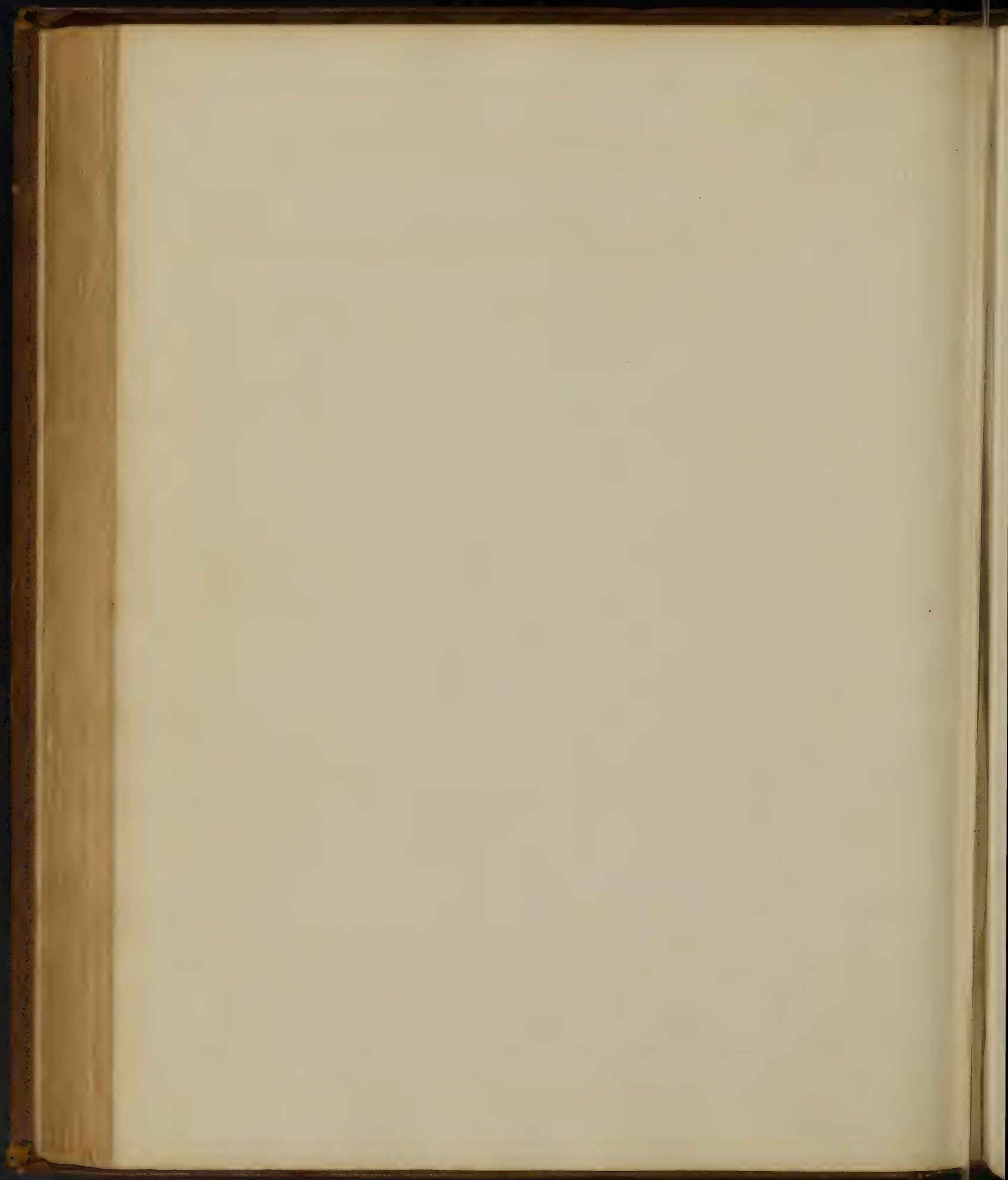












Prerogative Writ.

Writ of Mandamus. Way. Mr. Gould.

This is a prerogative Writ issuing in Eng. from S. R. & answers in some degree in its effect to y^e specific relief afforded in Chy. 3 B. 110. It may issue. (Talk 429) from Chy. Term 1688 1705. But y^e right is now exercised in B. R. only.

It is granted in those cases only which relate to y^e government or y^e public, & when without it there is to be a failure of justice. 3 B. ac 527. Doug 506. 4 Mod 281. to enforce obedience to acts of the Legislature, & in Eng^d, to y^e Kings Charters; to prevent disorders from a failure of justice, & a defect of police. (3 Burr 1267) there being no other specific remedy.

Generally not granted where there is an adequate remedy by actions. Doug 506. p. 4 1 S. R. 148 Cowp 377.

The writ is grantable in Comm. by the Sup^r Court.

The object of the writ is generally to restore a person to some corporate or other franchise or right which concerns the public, or y^e administration of justice, & of which he is deprived; or to admit a person to the same rights &c. Esp 661. 11 Co 93. 3 B. ac 529.

The writ issues to some public officer, body corporate, or inferior to commanding a performance of their official or corporate duty. 3 B. ac 528 4 Mod 52.

It is a writ demandable of right & the S. R. are bound to grant it without imposing terms. 3 B. ac 528.

It lies to compel officers of corporations to call meetings.

Prerogative Writs. }

to hold relations to when they saw it is their duty, Stra 1000
MS. Dec 91. St. May? 69 Esp 662

To put on a person to every description of corporate of
fices. Esp 661. T. Ray? 431. 1 Sid 14. E.g. of Town Clerk - Sheriff
man, Constable &c. &c. but legally deprived of their offices.
1 Went 77. 4 Bur. 1999. Rep L. 176.

To command persons in authority to do their duty, &c.
To a Judge of an Inferior Court to proceed to Judge's Office. 113.
2 Repl. 87. 3 Bac 535. 6. To Ecclesiastical, &c. (of Probate
in Conn.) to grant probate of a will, or administration
to whom it belongs to. Ep 662. 3 Bac 534. Gaith 457. Sal 299. Str. 552.

It lies to a Charter of a Corporation, requiring him to deliver
to the Brooks &c to his Successor, on his being removed from office.
cap 663. 2 Stat 879. 1 Will 305.

Not fixed by any general rule, what offices concern
the public or administration of justice to which one claims
to be restored or admitted. The writ has been much extended in
modern times. 3 Bac 529. Decides that the offices of Mayor
- Aldermen - Common Councilmen - Town Clerk - Constable
Seyton, or Eng. parish Clerk &c. 3 Bac 530. 11 Co 94. 2 Bulst.
122. 2 Ray 78. 1 Vent 143. 153. 2 Hyl 211. 2 Sid 112. 1 Rol 533. Sal.
175. 600 up 371. 377.

So it lists custom one to the place or office of Attorney in
in service of B Bac 530. 1 Lev. 75. 1 Rut 549. 1 vent 11. So to our
County Court.

The Officer in these cases must be of a "certain personal nature." - Therefore an Officer under an establishment or institution depending on voluntary subscriptions, not endowed, is not entitled to it. Esp 665. 17 Wily 11. 15. 16. 331. 4 St 125.

Prerogative Writs.

Manicamus.

But the Office need not be freehold. It is sufficient that it is an annual Office - That fees annexed. Es. 556. 1st. 12. 146. This rule extends the writ. to all our public Offices in Con. So a Constable can command a County Treasurer to pay money to a Cred^r of the County - So to command Justices to lay a County Tax.

Whin y^e Office is merely of a private nature Ch. writ
will not be granted. e.g. in Eng^y Office of Steward of a Co. Baron.
Esp 666. 1 Sid 40. 1 Vent 143. In Con. Offices of private Companies -
as library companies w^o fall under y^e description of private Of-
fices. Also Turnpike Companies, incorporated, &c. The grant
of incorporation is analogous to Ch. Kings Charters. 3 Broc 528. n.

The writ never goes to enforce an act by a Court, magistrate &c. - when it is uncertain whether he has by Law a right to do it. Exp 865. 1 Will 266.

e. 400 where there is another specific legal remedy. e.g.
It goes not to a Bill to compel a transfer of stock - for case
lies. Esp 666. Doug 506.

It never is granted to compel a Cc. magistrate, but on an act, when the doing of it is discretionary. Esp 608. *Wheat* 581.2. *BC* 11. 708.

If Severals are deprived of franchise, office to each must have a separate mandamus. they cannot join - the wrongs are distinct, & causes may be different. 35 p 668. 9. Salt 433. Bul 200.

Mode of Granting the Writ.

It is not usually granted in the first instance, tho
it sometimes is - The usual mode is by a rule to show
cause (Esp 669.) & this is not granted but on affidavit by
the party applying. 3 Bac 528. Bull 199. 200. 30 C 11. but under
peculiar circumstances it will issue in the first instance.

on motion. Esp 669. Day 180. E.g. to sign poor rate in Eng.

It is never granted till there has been a default. It goes not to prevent a default. Esp 679. Bull 199.

The writ is directed to the person, whose duty it is to perform the act commanded. Esp 672. Day 2436. 433. Not to another to procure the act done.

When the act ought to be done by a part of a corporation aggregate, it may be directed to y^e whole corporation, or to that part which is to do the act - but not to any other part. Esp 637. Day 2694. 701. 11 Ann 55.

When sufficient cause against issuing the writ is not shown, the writ itself issues, at first, in y^e alternative: to do y^e act, or show reason why not. 313C III.

If y^e Def^r. return a sufficient reason, he is excused the reason being true.

And at C. D. the return of the officer is not to be traversed - But Case lay for false return. Esp 648. 1 Vent III. Salk 32. Doug 121 - & now by Stat of Ann it may be traversed, or in other cases pleaded to. Esp 648. 3 Bac 543.

S. Ray. 481. Our Ct have adopted y^e reason of this Statute.

Since this Stat. if the return is false (which is a Question to be tried by the jury) the party injured has a peremptory mandamus. 313C III. & also an action on the case for false return. 313C III. Esp 648.

At C. D. the only remedy for a false return is an action on the case. Esp 648. 313C III. 11 Co 99. And if the false return were made by several, the action may lie vs all, or any, it being for a tort. Esp 685. 3 Bac 544. Carth 171. 172. - Action lies for Suppression writ in the Return. Doug 194. Judge R. says y^e action of Trespass on y^e Case was unknown till y^e Stat Westminster 2^d. - See then as to y^e above. 2. P. II.

Perogative Writ. 3

Abundamus.

But if any one of the several Jues. voted vs. a false return, or as overruled, no recovery can be had vs. him.

Exp 685. Carth 172. S. Ray. 564

If the return is insufficient. upon the face of it, a peremptory mandamus issues! 3 B. & C. 111 Exp 685. Bull 201.

If the return is falsified in the action on the case, a peremptory mandamus issues! (Exp 686. 3 B. & C. 544. Salk 430) provided the action is in the same Court in which the application ~~there~~ was made, i.e. in B. R. or our Sup. Ct.

If no return is made, an attachment issues; (Exp 685) for contempt, (3 B. & C. 111 3 B. & C. 431. 2. Salk. 429. 434) after a peremptory rule to return the writ. — Stra 808 that the attachment must go ~~as~~ all the same w^o have made a return. Contempt is punishable by fine, or imprisonment, or both, & in some cases with corporal or infamous punishment. 4 B. & C. 287. Cro. C. 146.

Prerogative Writ

Writ of Prohibition

This is a prerogative writ issuing generally from S. B. to prevent inferior courts from deciding cases out of their jurisdiction. 3 BE 112. 4 Bac 240. 1 Com 487. 11. N. B. 39. 40. 12 Co. 279.

And it may also issue out of Chy. Common Pleas & Exchequer. 3 BE 112. 12 Wm 476. Hob. 15. Palm 523. 4 Bac 241. 12 Co. 58. 4 Com 489. 176 BE 476.

It is directed to y^e inferior Ct. & Ch. party; it is founded on a suggestion that the cause itself, or some collateral question arising in it, is out of the inferior Ct's jurisdiction. 3 BE 112.

The mode of obtaining a prohibition, is by a rule to show cause why &c. In many instances affidavit must be made, that y^e cause or question is out of the inferior Ct's jurisdiction. After which that fact appears from y^e face of y^e declaration, libel, &c. of y^e inferior Ct. 4 Bac 244. 10 Wm 476. Sal. 549. Hob. 590. Hob. 79. 2 Ray 1211.

Whether y^e awarding of prohibitions is ex debito iuris, or discretionary - authorities contra - Better opinion that it is discretionary. 4 Bac. 242. Hob. 67. 2 Ray 3. 4. 12 Co. 58. Sal. 53. 2 Ray 220. 578. 586. 7 Ray 122.

It lies in some instances, when the inferior Ct. has jurisdiction of the cause. e.g. where a Stat. has been passed, regulating y^e proceedings in such cause, & y^e inferior Ct. deviates from those regulations. This case is y^e want of jurisdiction, & to be y^e only ones in which a prohibition can issue. 2 H. BE 100.

If the cause suggested is sufficient the writ issues. (3 BE 113.) i.e. after y^e rule to show cause. After if the cause is insufficient. The writ commands the Court not to hold plea, & y^e party not to prosecute.

Prerogative Writ: 3

Prohibition.

But if the sufficiency of the cause suggested is doubtful on a Dec. of difficulty, the party is directed to declare in prohibition. (3 B.C. 113. 4 B.C. 248. Cro. E. 736) i.e. to prosecute an action by filing a declaration vs the opposite party, upon a fiction not traversable, that the latter has provided in disobedience to a prohibition before granted. Barnes v. 8. 148. 4 B.C. 94. 12 B.C. 400. 151. 2. Cro. E. 736. 4 B.C. 248.

The Declaration must follow the suggestion. The action is regularly proceeded with by a Dec. of sufficiency of cause suggested, tried upon the pleadings. If the cause suggested is adjudged sufficient, judg. with nominal damages is given for p.p. of prohibition issues. 4 B.C. 248. w.

If insufficient - judgment for Def. & a writ of consultation awarded - i.e. a writ issued upon deliberation or consultation had - remitting the cause to y: inferior Ct. to be there determined, notwithstanding y: former fictitious prohibition. 3 B.C. 114.

So too a writ of consultation is sometimes granted, where there has actually been a prohibition. e.g. the party prohibited may take a declaration, pursuing the suggestion, traverse the fact, on which prohibition was founded, and if y: issue is found for him a consultation issues. 3 B.C. 114.

The Court itself by its own motion sometimes awards a consultation. e.g. when upon further consideration it thinks the suggestion insufficient. 3 B.C. 114. 4 Com. 517.

Disobedience to the writ is a contempt, punishable by fine imprisonment at the discretion of the Court. 4 B.C. 262. 4 B.C. 40. 279. 4 B.C. 287.

It is also a contempt to commence a new suit in y: same Court for the same thing after a prohibition. 4 B.C. 262. 4 B.C. 599. 1 B.C. 111.

Prerogative Writs.

Prohibition.

On the attachment for contempt, the plff. recovers damages & costs for the others, proceeding after the prohibition.
1 Vent. 348. 3 Rev. 360.

We have a Stat. vesting the power of granting prohibitions in the Sup^r Ct. enabling the Chief Judge or 2 assistant Justices to do it. in vacation. This Stat. adopts the English law on the subject. Stat. 347.8.

Writ of Habeas Corpus.

This is a writ by which a person restrained of his liberty may be brought before some Superi^r Ct. for some special purpose, either on his own application to be relieved from confinement, or to obtain justice, or upon that of some other person, having a right to require his appearance. 3 BL. 129. 131.

Of this writ the kinds are, various. Ist Ad respondendum. This lies when one has cause of action against another, confined by process of an inferior Ct., to remove the prisoner, so as to charge him with a new action in the Ct. above. 3 BL. 129. 3 Bac 2. 2. 197. 2 Mos 197.

II^o Ad satisfaciendum. This lies when judgment has gone against the prisoner, & the plff. is bringing him up, to serve him with process of execution. 3 BL. 129.

III^o Ad faciendum et recipiendum. Which lies where a person confined by process of an inferior Ct. wishes to remove the action to a Superi^r Ct. to be decided, there his Writ is removed by Habeas Corpus. the proceedings by certiorari. 3 BL. 130. 3 Bac 2. 15. 1 Mos 235. 2 BL. 198. frequently called "habeas corpus cum causa."

This kind of Hab. Corpus is demandable of common right, & without any motion. 3 BL. 130. 2 Mos 306. It instantly supersedes all proceedings in the Ct. below, & any subsequent proceedings are void as *coram non-judice*. 2 n 3 Bac 15. Hal. 352. 12 Mos 666.

Not granted, the matter of right, when it is a bare rightful writ; or rather a *procedo* so is awarded. 2 n 3

Prerogative Writs. 3

Habeas Corpus.

If term, sole hanging in an inferior Co. man is moved, then remove it. 3 Bac 15. 3 Al. 8. These three kinds not in use here.

1st Ad Testificandum. When a party wishes to improve a prisoner as a Witness. 3 Bac 3. 3 Hal. 51. Com. l. 17. 48. Kirby 137.

It formerly helden that this writ is an escape of a prisoner in execution. 1 Sid 13. 3 Co 44. 2 Bac 238. vide title "Sheriffs" & not so now. Prisoner released by order of the Assizes - no escape. 1 Root 72.

Never granted to bring up a prisoner of War. 2 Bou 403.

But if the Sheriff or gaoler, in any case, gives the prisoner unnecessary liberty, as to go at large, or goes with him in a very circuitous way. it is an Escape. 1 Mod 116. 2 Bac 238. Cro C. 14. Hob. 202. 3 Co 44. See "Sheriffs".

There are some other kinds of Habeas Corpus.

3 Bac. 2. 3. But...

2^d The principal writ of Habeas Corpus is that ad Subjiciendum directed to the person having another in custody commanding him to produce. & to do, submit to, & receive whatever the Co. or Judge shall award. 3 B. C. 131. A Com. Law writ in favour of the liberty of the subject 1 Burr 631.

This is the writ by which release is obtained from every species of illegal Confinement. 3 B. C. 131. Root 72. 93.

A person imprisoned by either house of Parliament for a contempt, cannot be discharged by this process. 2 T. R. 314.

It issues at Com. Law from the H. C. by a fiction of privilege, or being a suitor from C. D. Crook. 5434. B. v. 556. 3 B. C. 24. 3 B. C. 131. 2. 3 Bac 3. 2 Mod 198. — Ex parte.

Prerogative Writ.

Habeas Corpus.

that in case of commitment for a crime, the *h. c.* only take Bail or remaind. 3 B.E. 132.

Whether it may issue from *Ch. 3* in vacation. 2 W. 3 B.E. 132. 3 B.E. 3. 2 Hal. P.C. 147. Seems not.

Any of the judges of B.R. may issue it in vacation. 3 B.E. 131. Cro. J. 543.

It is directed to the jailor or other person detaining, to produce the Body with the cause of his detention. 3 B.E. 131. Stat. 350. 2 W. 3. 586. 618. And the *h. c.* as the case requires, discharge, admit to Bail, or remaind. 3 B.E. 134. 3 Mod. 22. Point 330. 346. - that the prisoner may not continue under restraint of liberty, without cause.

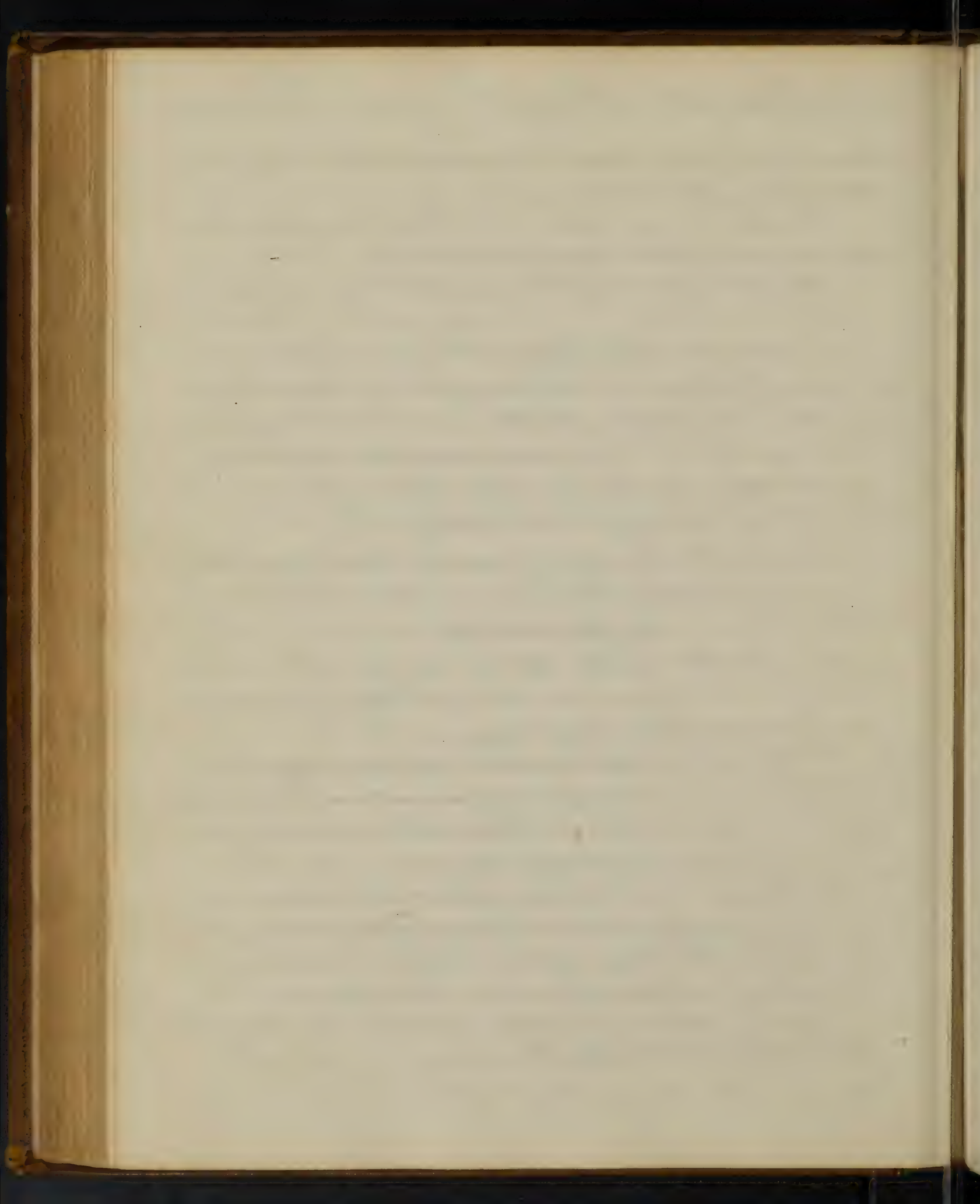
The Com. Law having been evaded by the judges, a Stat. was passed, 32 Car. 2^d which now in a great measure regulates this writ. 3 B.E. 135. 6. 3 B.E. 7. 8.

Since this Stat. any of 4:12 judges may issue it in vacation. 3 B.E. 136. Dies for persons committed by the King or his Council, or a Secretary of State &c. 3 B.E. 135. 6.

It lies not for persons committed on execution or conviction; by Stat. 32 Car. 2^d it is denied in cases of commitment for treason, for any (or certain other cases) under special circumstances, &c. 3 B.E. 136. 3 B.E. 9. 10. Mod. 429. Stra. 142.

It lies in favor of children, wards, &c. &c. 1^o unreasonable confinement by parents, guardians &c. 3 B.E. 15. 3 H.B. 526. 2 W. 128. Stra. 932. And the Writ may be sued out by the friend of the person confined. Stra. 932. Bar. 606. 5 Mod. 31. Burd. 631.

Disobedience to the Writ - punished as a Contempt. 3 B.E. 10. H. & B. 68. 12 Mod. 666.



Precative Writ.

Writ of Audita Quarta. By Judge's order.

This writ issues when a man has a good reason for not paying an Execution, but has no day in Ct. on which he can make his defence. As if he has satisfied the judgment in some way, as by account satisfaction &c. So if the Execution is paid up and a receipt ^{at a loss} given, & no endorsement of the payment on the Execution, & then the Creditor denies that it has ever been paid, & presses the Execution. Then he might have an action on the case, but not however till he has paid the money a second time, which might be very inconvenient. He may in such case have an Audita Quarta to stop the Execution, & does more, it operates as a discharge of the Execution.

But if he has paid the debt & don't plead payment at the Trial he cannot have this writ, for then he has had a day in Court. It is because the party has no day in Ct. that an Audita Quarta issues, or is granted.

So if he might have had a day in Ct. but has no reason to expect judgment. This writ will lie. As if A has a Bond B. B. and B. comes & settles it after a suit is commenced but does not take up the Bond it being in the hands of an atty. B. says you will take care to stop the proceedings on that suit. Atty. says A. & then directs his atty. to take judgment of B. which he does. An Audita Quarta is granted in such case to afford relief B. y. judgment.

It may be that judgment has been obtained B. one who by accident has never had notice, as if there are two

Prerogative Writ.

Audita Querele.

man of the same name & the writ was served on y^e wrong one. He does not appear & judge is rendered by default vs. him. Here he has properly no day in Ct. Execution goes vs. him. He can to be sure have an action on the case for his Damages, but this is not an adequate remedy. An Audita Querele writ. to be granted.

And where the practice prevailed of conferring judgment on awards, if execution were issued upon them, in property, this writ might be had to obtain relief. See "Awards."

Mode of obtaining this Writ.

In Eng^l. I have seen several cases, & in all of them the application is to the Chief Judge of the Common Pleas. But I suppose that in those cases the judgment was then rendered. From these cases we have (in Conn.) adopted that the Judge of the Com. Pleas in all cases. But I think the application sh^d be to a Judge of that Ct. where the judgment was rendered. This writ is not to be granted of course, it is not ex debito justitiae. - If so, every one who did not wish to pay an Execⁿ. would procure this writ. The Judge has an ex parte hearing. The petitioner produces his proof & if it appears that there is cause y^e Judge signs the Writ. He can't issue it without proof.

This writ is in the nature of an action on the case. It summons the judgment Creditor to appear in Ct. & if the Complaint is well founded, the Debtor recovers Damages, & y^e Execⁿ. is discharged.

A Bond is always given upon granting an Audita Querele, conditioned that he will prosecute his claim & abide the judgment. And the Audita Querele writ. is

Prerogative Writ.

Audita Querela.

Bond is a complete supersedeas to the Execⁿ from the moment it comes into the officers hands. The officer must stop the proceedings however far he may have gone. If he has committed the Debtor, he must discharge him. If he has taken property he must give it up. The Execⁿ is entirely superseded & destroyed.

If an Audita Querela is issued without a Bond being taken it is void in toto. And no officer sh^d execute an audita querela until it appears that a Bond has been given, as large as the demands on the execution. It sh^d be larger, in order to cover the costs. The officer cant judge as to the goodness of the Bondsman.

There is a similarity between this Writ, & a Writ of Error. This difference - A writ of Error stops the Execⁿ from proceeding, till after trial of the Error - but it is not a complete supersedeas. Audita Querela is. Again if a writ of error is commenced & the execution is partly executed it cannot be stopped. So as in Audita Querela. 11 Bacon Audita Querela.

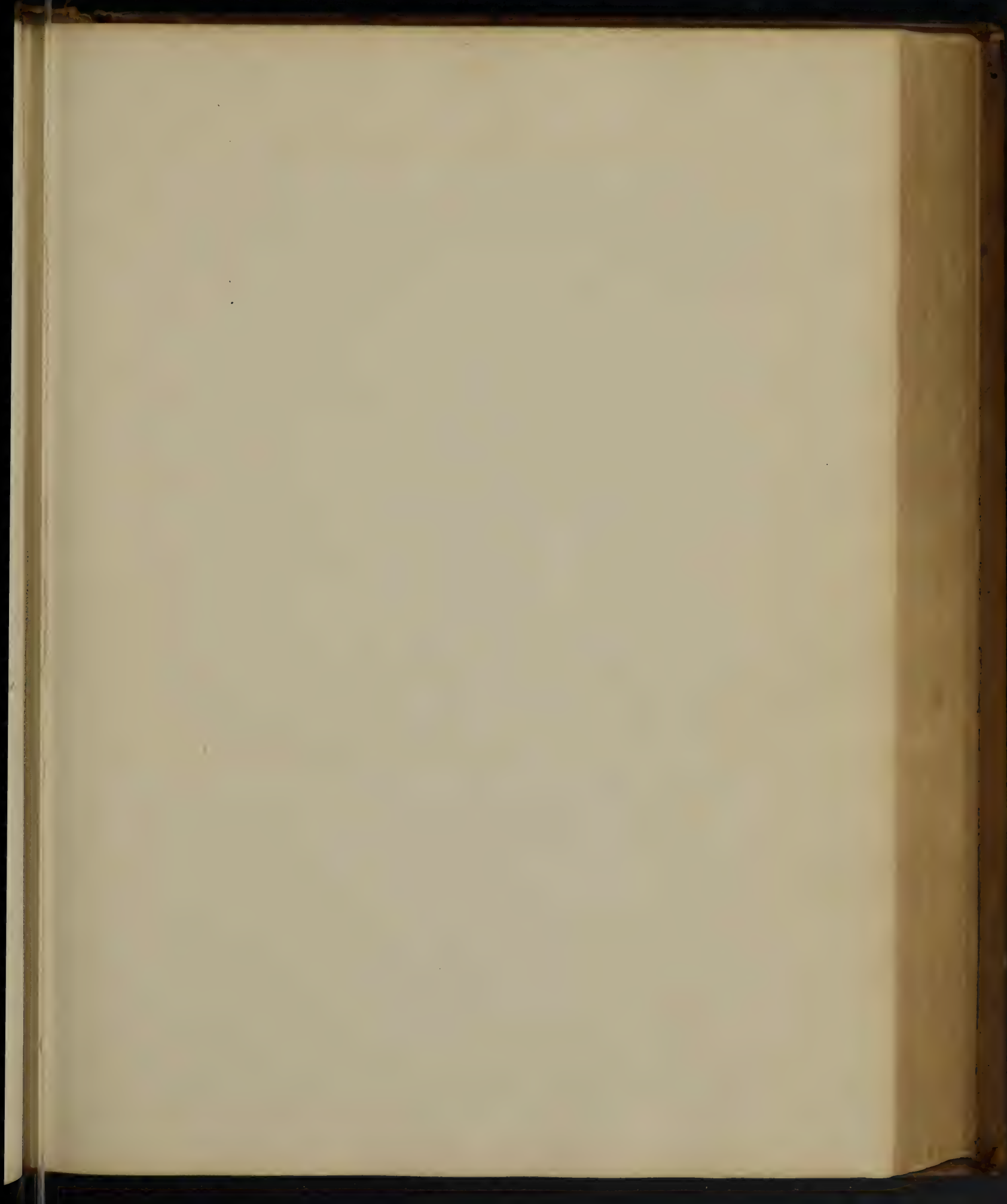
Prerogative Writ. 3

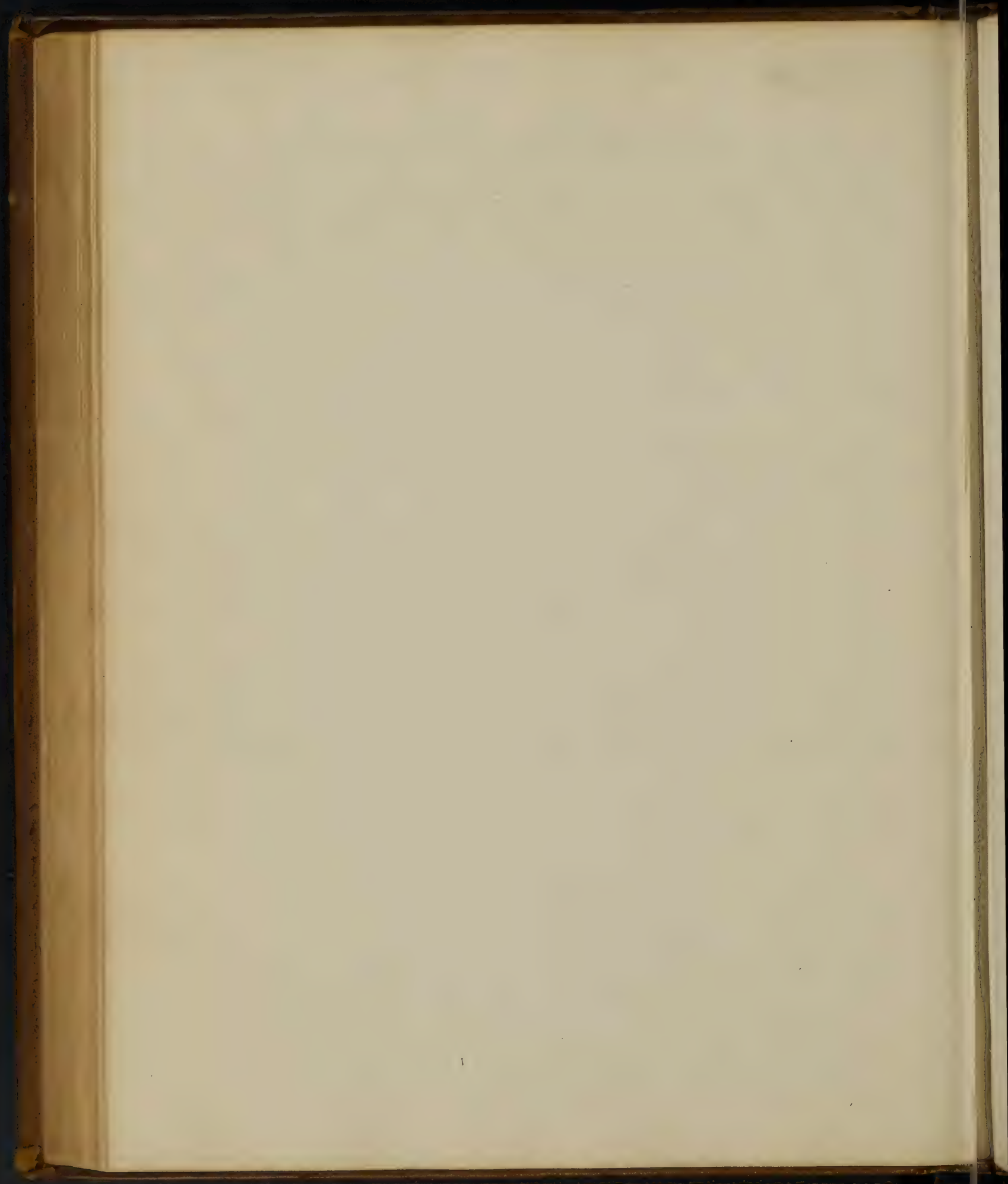
Writ of Quo Warranto. 102, the judge

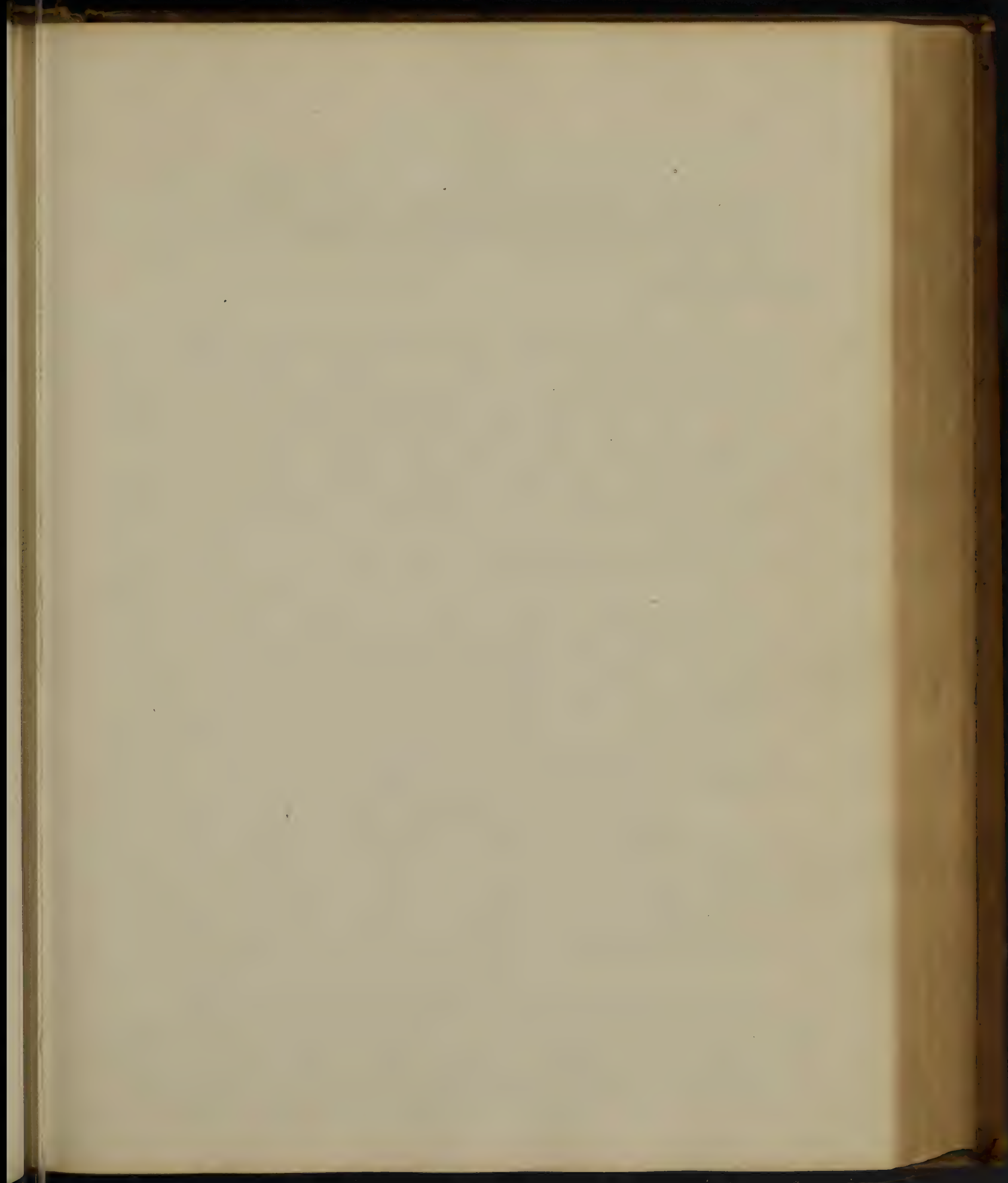
This writ issues directing the person or persons to appear before the court by what authority they exercise a certain office. It may be that where one person exercises a right he belongs to another. As the various franchises in Eng^d. such as having a Market, &c. We have but one case of this kind in Conn. (that was in U. S.) & that is a right held by a man this being forced to keep a public house between Hartford & New Haven.

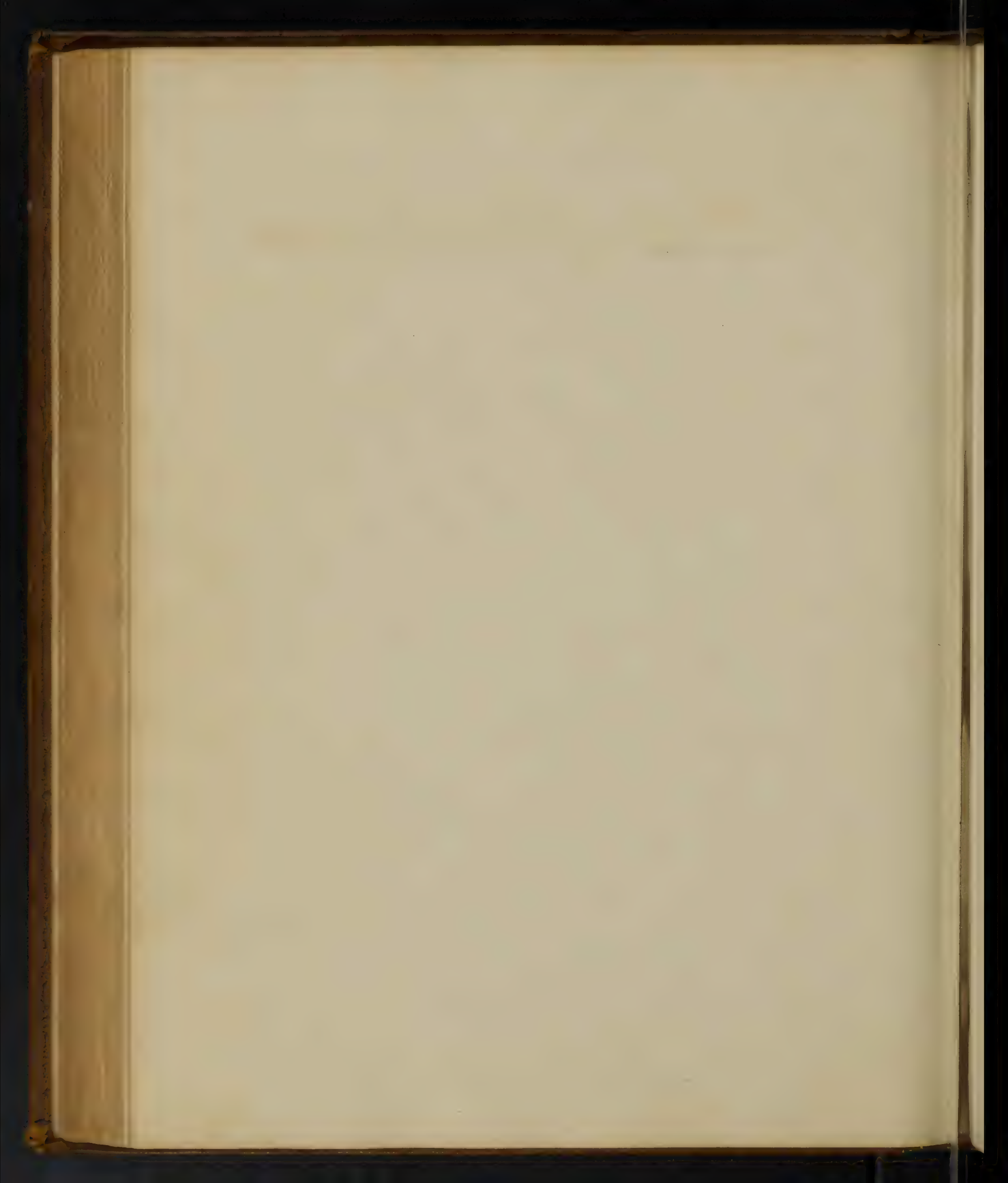
But it usually issues where corporations, or individuals of it exercise powers which do not belong to them. As when one claims an office which another exercises because he was improperly chosen. Then the individual may have this writ. This is called the relation. So when the corporation exceed the limits of their charter, the public may have this writ issuing vs. the corporation in their corporate name.

7 Co 28. 4 Co 191. 2 Roll 205. 11 Co 116. Coheut v. v. v. to show the forms
527. 544. 561. Stra 299. L. Ray? 1559. 1 Sa 144. 13 How 280. 2 Bur 869.









Pleas & pleadings.

By Gould.

Pleadings are defined to be the conventional allegations between the Plff. & Defend. in a suit, put into legal form & set down in writing. 3 Bl. 398. 398. 10 Co 132.

Antiently in Eng. all pleadings were oral. The counsel delivered in his plea viva voce, & then it was reduced to writing by a Clerk or Prothonotary. Hence they were frequently called in Norm. an. French parols; thus it is spoken of the parols Demurring.

In Great Britain, from the time of William the Conqueror or until the 36th. Edward III. pleadings were in Norman French, which is properly the language of the Law. From this time, till the 4th of Ric II they were in Latin & by a Stat. of that year they were reduced to English in which language they have ever since continued. 3 Bl. 397. Laws 29. 23. - 4. Bac 1.

The English reports till the time of Car II were in Norman French, because the pleadings were in that language & the greater part of them were now translated.

All pleadings in civil actions in Eng. & in this Country are required to be put into writing.

In strictness then, pleading is nothing more than setting forth upon the record such facts as constitute the plain ground of the plaintiff's demand or claim on one hand, or of the Defendant's defence on the other. This is the precise definition & see Supplement at end of the volume.

pleadings. General view.

of Pleading. 3, T. R. 159. May. 278.

Lord Mansfield has observed that the substantial rules of pleading are founded in the strongest sense & in the soundest & closest Logic; & Littleton, that it is the most honorable part of the profession. 1 Burr. 319.

The great object of pleading is to present the claim of the plff. & the defence of the Defend. in such a manner as will most commodiously admit of an easy & impartial trial, so as to bring the claim & defence on both sides to some precise definite point. Without a system of rules in pleading, there would be no uniformity in the administration of Justice. 1 Burr. 319.

Pleading is strictly a syllogistic process. Every good declaration & every good plea contains the elements of a good syllogism. A Declaration is not a syllogism in form, but it is in substance one. Thus to exemplify the proposition... Suppose there is a declaration in trespass quare clausum frigit. The plff. is the pleader. The syllogism is this. Major proposition - against him who has forcibly entered upon my Land, I have a right by law to recover damages; minor prop. the Defend. has forcibly entered upon my Land Conclusion. Therefore against him I have a right by law to recover damages. The Major prop. contains the legal principle on which the plff. founds his claim; the minor contains the facts to which the legal principle is to be applied in the particular case; the conclusion is an inference of law from the application of the principle to the matter of fact stated. These propositions then must all be capable of being denied. The Defend. is at liberty to deny the legal

Pleas and Pleadings. General view.

principle, the facts contained in the minor proposition, or the conclusion. The rules of Law have settled how they are to be denied. The first is to be denied regularly by an issue in Law, called a Demurrer*. The operation of a demurrer is to admit the matter of fact so far as it is properly stated, but to deny the sufficiency of it in Law in favor of the pleader. The minor prop. is denied by an issue in fact, which may be either a general or a special issue. If both propositions are admitted, or not denied, (which amounts to an admission), the conclusion can no otherwise be answered than by alleging new matter & this must be done by a special plea in Bar. He cannot traverse the conclusion. He may deny it by a special plea in Bar, as a release for instance. The plea of a release presupposes the major & minor propositions to be correct, but avoids the conclusion by something new. This plea also contains the elements of a good syllogism. It is as follows: If he upon whose land I have forcibly entered release the trespass, his right to recover damages against me has ceased; the plff. has released the trespass complained of; therefore his right to recover damages against me has ceased. Now the plff. again must be at liberty to deny either of the propositions. If he would deny the first, he must demur because it denies the legal principle. If the second, he will deny that he ever released. If he denies neither, he can avoid the conclusion only by new matter contained in a special replication. As if the release was obtained by fraud he must state the facts. This view of the general principles of pleading may be pursued from the Declaration to the Verdict.

* See Supplement note 6.

Pleas and pleadings.

1st. The Writ.

The first stage in a suit is, in England, "the writ." 3 B.C. 273. Comp. 454. 7 J. B.C. 4.

This is a mandatory letter directed to the Sheriff, and, issued by proper authority, to compel the appearance of the Defendant. 7 Wils. 147. 1 B.C. 41. East 233 & Bur. 960.

The suit is regularly & for most purposes commenced, from the issuing of the writ; but in B.C. it is not commenced as this is after the plaintiff's appearance & the filing of the bill, because the writ is analogous to a bill in Chancery. Hence it is considered the original commencement of a suit. See auth. ^{supra}.

In Conn. the Declaration & writ issue together. In strictness the writ is the foundation of the suit here as well as in England. But the first stage of the suit here is as much the Declaration as the Writ. The suit is not considered ^{here} as commenced to all intents & purposes until service has been made upon the Defendant, for it has been decided by our Supreme Court (1 Root 486.) upon a plea of tender, where the writ issued & no service made before tender that it was good tho he did not tender the costs.

For many purposes however the suit is commenced from the issuing of the writ, because the cause of action must exist at the date of the writ. As if a writ issue to day upon a bond due to morrow & not served till the next day the plaintiff cannot recover.

2nd. Declaration or Complaint.

The first stage of the pleadings is the Declaration or Complaint. This contains a statement of the grounds upon which the plaintiff claims his recovery. The writ is not a part of the pleadings.

Pleas and pleadings. Declaration.

All the statement it contains is made by the Count. There is here no material allegations or averments. 1 Laws. 75. 1 Inst. 172. Plowd. 84. 3 Bl. 293.

The words Declaration Count have been used as synonymous; but a distinction has lately obtained. If there are two or more counts or distinct statements in the cause, each distinct statement is called a Count, & they all together the Declaration. Yet when there is but one count they are synonymous.

The Count or Declaration is but an amplification or exposition of the original writ. The writ itself must name the cause of the suit, & the parties, but it states it very briefly. It does not state the special facts out of which the cause arises. These are reserved for the Declaration. 3 Bl. 293. 4 Bac. 8. 5 Com. 18. Saith 304. Salk 219.

We have no concern with what is called an "ac etiam" in bourn. This is a clause inserted in the Bill in B. R. for the purpose of giving that Court jurisdiction over matters purely civil. This Court had original jurisdiction of no other civil causes except Torts, for which a fine is due to the King. But when once the Defendant is in the custody of the Marshal of the Court, he may be charged with any personal civil action whatsoever. Of real actions they had no cognizance in this way. The writ then may contain a clause charging him with a Tort, as e.g. trespass, & then "ac etiam" with debt also. The first cause of action gives the Court jurisdiction over the person, & then the "ac etiam" enables the Plaintiff to declare agt. him in the personal civil suit.

The pleadings include the Count in the largest sense of the term. In the limited sense of the term, they embrace those.

Pleas and Pleadings.

allegations only, which succeed the Count, & they denote those allegations which the Defend. makes by way of defence to the action & those which the plff. makes to fortify the Declaration. 4 Bac. 1. 6. 8. 3 Bla. 299.

The first stage of the pleadings then in the limited sense of the word is the Defend's plea. 3 Bl. 301. The pleas on the Defendants part are divided into two kinds. viz.

1st. Dilatory pleas. & 2nd. Pleas to the action.

First. Of Dilatory pleas. These are such as tend to delay the suit by questioning the mode in which the remedy is sought, rather than by questioning the cause of the action itself. 3 Bl. 301.

This first class of the Defend's pleas admit of a subdivision. According to Blackstone they are of three kinds, viz. 1st. Pleas to Jurisdiction; 2d. Pleas to the disability of the Plaintiff; 3rd. Pleas in Abatement. The two last tho' often confounded are as distinct as any other plea. These three classes comprehend the whole of dilatory pleas. A different division is made by other writers. The propriety of this division is questioned by Laws. It is however immaterial as they embrace all descriptions of dilatory pleas.

1. Pleas to the disability are often called pleas in abatement & so are pleas to the jurisdiction sometimes. Abatement has been considered as a generic term including all dilatory pleas whatsoever. But improperly. The form of this is distinct from either of the others. The object & effect are different from either of the others; therefore it is illogical & improper to call a plea to the jurisdiction or disability of the plff. a plea in abatement. 4 Bac. 35.

Pleas and pleadings.

Pleas of the second kind are

2nd. Pleas to the Action. A plea to the action is an answer to the merits of the plff's complaint, & denies the cause of action entirely. A plea to the action may deny the plff's right of recovering in three ways, either 1st. by denying the plff's allegations; 2nd. by confessing & avoiding them; or 3rd. by matter of Estoppel, this denies the plaintiff's right to make the averments. This is generally considered as an avoidance of the plff's allegations, but it is not strictly so. -

These pleas are of two kinds, 1st. the General issue, where the allegations are denied; 2nd by a special plea in bar, where there is matter of avoidance; 3rd. by Estoppel, by a plea in bar to be sure, but not by matter of avoidance. 3 Bl. 303, 305. 6 Laws 37. 8. 115. 130. 140. 3 Bl. 305. -

There is another mode of denying the plff's right of recovery tho he cannot by another plea. The way in which he may do it is by Demurrer. This is not in strict propriety a plea tho it is sometimes called one. It is not a plea for it denies no matter of fact, nor alleges any new matter. It only says "I am not bound to plead". The form also shows this. According to the form in Eng. the Defend. after saying the plff's declaration is insufficient proceeds to say "for want of such sufficient matter the Defend. is not bound to make any answer thereto". This is I think strictly a proper view of a Demurrer. This has been eluded however with pleas to the action; for admitting it to be a plea, it is not a plea to the action, for a demurrer may be taken as well to any other part of the pleadings as to the Declaration. A Demurrer then is a mode of denying the plff's right

Pleas and pleadings. General rules.

of recovery, but not a move of denial by plea. 4 Bac. 129. 30. 1 Inst. 72. 5 Mod. 132. Thus far of the general view of the mode of pleading. —

Lecture II.

I shall lay down some general rules relating to pleadings in General.

In all pleadings two things are necessary. The first & most important is that the substance of the plea be sufficient, or in other words, the matter alleged must be sufficient of itself, and secondly that this matter or substance be deduced & expressed according to the forms of Law. If either of these is omitted the pleadings are bad; if the former it is bad in substance if the latter it is bad in form. Hob. 164

There are different ways of taking advantage of these omissions. They are both good grounds of Demurrer. Omitting the first is good cause of General Demurrer, the last of Special Demurrer. — Co. 683. Laws 45. —

In all pleadings it is necessary to state facts only and not, may be, conclusions from facts; but it is never necessary to state conclusions of Law. True particular laws & customs are pleaded when the Court cannot "*ex officio*" take notice of them, but the general rule refers to the general law. Customs then which are pleaded are mere exceptions to the general rule. The conclusion from a fact, is a conclusion from a fact stated in the Declaration. It is not then a substantive, independent act of itself, for it is inferred from a fact expressed in the Declaration. This is "*conclusio facti de facto*" 5 T. R. 70. Doug. 159. Laws 46. —

Rule 2. Another general rule in all pleadings is, that every plea should be direct, not argumentative, nor by way of

* See Supplement C.

Pleas and pleadings. General rules.

of recital. The avowment of every thing material must be positive, & this general rule requires one thing, that things immaterial need not be directly stated, as mere matters of inference.

But no fact however important it may be, need be stated by way of direct positive avowment, if it cannot be distinctly traversed by the rules of pleading. By the rule last mentioned is meant, that the party pleading should state the principle fact itself direct & in positive terms; not the grounds from which he would infer the principal facts. This he cannot do under a "whereas", but must aver it directly & precisely. Thus if A. in assault & battery should declare against B. that "whereas" &c. it would be ill, for the general issue would be absurd; "whereas he did not" &c. and verdict cannot cure this defect, it is substantial. This is stating the material thing indirectly.* *How. 128. 1 Str. 303. 7 T. R. 458. 5 Saund. 54. 13 2. 4. 4 Bac. 97. 22*

But it has been holden & seems now established that an avowment following the words "quia", "licet", "pro eo quod" are substantially sufficient, notwithstanding the rule above laid down. *1 Gaud. 117. note 4. 1 Ser. 194. 5 Saund. 47. 59. 2 Vent 278.*

According to this rule then, it is apparent, it is not sufficient for the party pleading to state the mere evidence of the principal fact to be established. This amounts to nothing better than argumentative pleading. Thus in *Indes* status *assumpsit*, if the plff. should state that the Defend. became indebted &c. and became liable to pay him; the declaration would be insufficient, because the indebtedness and consequent liability are the mere evidence of the implied promise. The indebtedness of the Defend. & consequent

(* see Supplement, &c.)

Pleas and pleadings. General rules.

liability is all that is necessary for the plff. to prove, consequently they are the evidence of the promise. So also in a note of hand, he only describes the instrument, which is merely the evidence of the promise. This declaration is bad & has been so holden by our Courts on a writ of Error...

To in trover, if no conversion (which is the gist of the action) is alleged, the Declaration would be bad, for demand & refusal are only evidence of a conversion. They are not the conversion itself.

Suppose one states in his declaration that J. S. will swear truly that the defend. did promise to pay the Plff. at such a time, such a sum of money; this is evidently bad, but not more so than the others in point of principle, for the oath of J. S. is stated, which is the evidence of the promise. Bro J. 333 2 1200 73. 1 Savond. 274. note.

3d. Rule. Another general rule in all pleadings is, that each party admits as much of his adversary's allegations as he does not deny. Heaving a right to deny if he does not he implicitly admits them. This rule holds true in all the pleadings. Each party's plea is to be construed most strongly against himself. If therefore two constructions may be put upon a plea one in favor & the other against the party pleading, that construction which operates against him must be adopted, since it is presumed that each party will make the best of his own case. If it were not so, chicanery would prevail to pervert the course of Justice. This rule holds in all cases & in cases, as in written contracts. 4. 13ac 2. 73. 1 Inst. 303. Hob 234. good auth. Plowd 302. 2 Sams 52. Latob 136.

Pleas and pleadings. General rules.

1st Rule. Another general rule is, that in pleading, traversable facts, it is in general necessary for the party pleading to allege the time & place. Some time must always be stated, yet he is not bound to prove a time, except when otherwise it would work a variance. A place must be laid for sake of a venue. So in transitory actions some place must be stated, because according to the strict rule of the common law, the action must be tried in the very county where the action arose. This rule of Com. law is varied from, by fiction, continually. This is however more form. Were it strictly held to, no contract written, or bond executed abroad could be sued on in this country. In Eng. they evade the rule in this way: If a bond given in New York be sued upon in Eng. they state New York to be in "the U. States &c. and" "in the parish of St. Mary Le Bow in the ward of Cheap," & this fact is not traversable. Laws 57. 8.

In actions brought to recover personal chattels, or for injuries done to them, it is a general rule, that it is necessary that the number, quantity and price of them should be stated; but it is never necessary to state the truth in these particulars, except where a mistake in either of them would work a variance. As in trespass, he must state that Defend. took a certain number of horses, & if he can prove he has taken but one, he will recover.

These are regularly but matters of form, except when a variance would be made. Thus if the plff. should declare that the Defend. made a promissory note, in which he bound himself to pay 100£ when in fact he bound himself to pay only 20£. this mistake would be

(*See Supplement, c.)

Pleas and pleadings.

fatal. The terms of a contract must be stated exactly as they are proved. In Torts, there is no matter of variance. Laws 49.

5th Rule. It is also a general rule that surplusage does not vitiate the pleadings. "utile per inutile non vitiatur" is a maxim of the Law; but still repugnancy in a material point will vitiate any plea. 2 East 333. Laws 63. Bro. J. 549. 1 Inst 303. Laws 42. 64. 170. Garth. 288. 9.

By surplusage is meant matter wholly unnecessary, or in other words, it is where a party having alleged sufficient for his cause proceeds to allege still farther something foreign to his plea. Now if the party state things neither good nor bad, they cannot injure the plea. 4 Co 42.

Repugnancy is a selfcontradiction in the Pleador, & consists of two or more averments of the party, being inconsistent with each other.

It is said in our books, that every thing must be pleaded according to its "legal operation" & not, as the case may be, the strict matter of fact. 4 Bac 100. 1 Inst. 173. 200. Comp. 49. Comp. 642. Bro. J. 238. W. R. 4. 116. I have thought, says Pound, this rule was wrongly supposed, & have found no authority in support of my opinion. Thus it is said, if one joint tenant should enfeoff another, this must be pleaded as a release, not as a feoffment, since one joint tenant cannot enfeoff another. So if a grant is made by a tenant for life, to the reversioner, this must be pleaded as a surrender, because it cannot enure as a grant. Or if one should covenant "never to sue his debt", the proper mode of pleading this is, as a release or discharge, not as a covenant. Now all these things may be.

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Pleas and pleadings. General rules.

thus pleaded, and it is the most proper way, but it is not absolutely necessary that it should be so pleaded. As in the case of the joint tenant, the law considers the feoffment as a release. Consequently the evidence of a feoffment will support the averment of a release. Might not therefore the feoffment be pleaded as a feoffment? Cannot the Court discover it when on the record as well as they can when off the record?

In the 2^d Ed. 136. 11. the rule is laid down as it ought to be by Justice Wilmot; it may be pleaded as a triable matter of fact or according to its legal operations.

6th. Rule. That which appears on the record need not be averred. This is another general rule. However material the fact may be, if it appears on the record the pleader need not aver it. 1 Inst. 303. 308. 9 Co 54^a 76^b 4 D. 11 Co 25^a 2 Roob. 247. 4 Bac. 7. or 2. 2 New R. 77.

As if the fact appears by the other party's own showing. It is entirely useless to plead except for the purpose of showing some fact, which does not appear.

And all necessary circumstances implied on the facts stated need not be specifically alleged. If the averment of one fact implies the existence of another, the latter need not be averred; if it only furnishes evidence of an other fact; this latter if material ought to be specifically alleged. Thus in pleading a feoffment, it is not necessary to aver that livery of seisin was given upon the feoffment. For the word "feoffment," *ex vi termini* implies livery of seisin. There are some opinions given that this would be ill. or dangerous if averred only by recital. 1 Inst. 303 b.

Pleas and pleadings. General rules.

Whatever is admitted between the parties in the pleadings cannot afterwards be contradicted. Even the verdict of a Jury cannot contradict it. Neither of the parties can retract what he has pleaded, tho' the Ct. in its discretion may allow the party to correct an error in his plea. The province of a jury is to find those facts only, which are averred on one side & disputed on the other, or in other words, those facts, about which the parties dispute, or in which they do not agree. B. & P. 289. 4 Bac 2.

* 7th Rule. It is a general rule that each party is bound to prove no other than material averments. This is not however universal. The pleader is bound, in some cases, to prove averments which are immaterial. This however he is required to do only in those cases in which proving the case differently would work a variance, i.e. where the immaterial averments go into the description of the ground of action or matter of defence, the party is bound to prove the averments as stated, altho' many of them are immaterial.

The rule is more ^{said to be} restrained to pleas of record & written contracts.† If in pleading a record or written contract the pleader will state any immaterial thing as a part of the cause of action or grounds of defence, and he cannot prove the immaterial fact as stated, his declaration or plea must fail. Doug. 6410. 2 B.C. 1104. 2 East 497. 446. Sams 48.

You will find two cases decided as late as Lord Mansfield's time, ^{in which this doctrine} is laid down, not confined to records or written contracts; but in a note to the case of those cases, the rule is restrained as laid down above. 3 T. R. 4465. Ex. 12. 31. 33

Tho' the rule is as above, it is never required of him to
* See Supplement p. 1. † Mr. J. thinks the rule is restrained to pleas of record & express contracts (not to written)

Pleas and pleadings. General rules.

him to prove impertinent allegations, i.e. such as are foreign to the subject of pleading. As if the plff should declare that the Defl. entered into a bond, & at the same time he "wore a white hat," the latter is an impertinent avowment and he is not bound to prove it. Bul. N. P. 5. Lecture III.

If the declaration, the plea, or any other pleading on either part, wants necessary form, or omits the circumstances of time, place &c. it is regularly aided by the adverse party's pleading over, instead of demurring, i.e. if he neglects to demur, & pleads over he cannot take advantage of the defect afterwards, for where the pleading is faulty in no other respect but this, advantage can be taken of it only by Special Demurrer. Thus if the fault be duplicity, the Defend. pleads the 5th issue, the defend. cannot take advantage of the duplicity. So where there is a party who pleads a record or deed & omits to take a "proportion" of it, still if the adverse party pleads over instead of demurring the fault is aided. Indeed it is a general rule that a defect merely formal is aided by the party's pleading over. 7 Co. 25. 8 Co. 120. 1 Inst. 303. Earth 64. Salk. 519. 2 Vent. 9. 2. 4. Bac. 2.

The principle on which this depends is that of a waiver. If in such case the adverse party does not take advantage of the defect in the manner pointed out by Law he waives all the advantage he might have taken advantage to the informality.

If the pleading on one side is ever so materially defective, i.e. omit material facts, still if the other party avers himself this material fact omitted by his adverse party, the pleadings will be aided. Thus if the plea is for

Matters and pleadings. General rules.

where a material fact omitted in the declaration, the declaration is aided by it. So if the replication covers a material fact omitted in the plea in bar, the plea in bar will be good, for in this case there will appear upon the whole record a cause of action where the defect is in the declaration. And altho it does not appear in the proper place, or is pleaded by the proper parties, still the defect is cured. Thus the plff. charges the Def. with carrying away "quendam harnum", not stating stating he had even the possession of it, or the right of property in it. The Defend. in his plea in bar admits he took the Hoot, the property of the plff. & then proceeds to justify it. This cures the declaration, which would otherwise have been bad on demurrer. 5. Bac 197. 1 Sed. 184. Com. Di. Reader, b. 55. c. 237.

But with substantial defects, no party can aid his adversary by replying over instead of demurring. They cannot be cured in any manner.

Any new matter alleged in any stage of the pleadings after the Declaration, must conclude with a "verification". The form of a verification is this, "and this he is ready to verify". The reason why this must be done is, that a verification is the established form or mode of leaving the pleadings open to further reply; for you will observe from what has been said, that the Pleader in fact has three ways of meeting new matter; first by denying it; secondly by confessing & avoiding it; and thirdly by demurring to it. But if the party has closed his pleadings, the new matter could not be denied, which would be contrary to the rules of pleading because

Pleas and pleadings.

where the party advances new matter, he cannot make an issue & compel the other party to join him in it. It is true the verification is the established form, yet it is something absolutely necessary that the party may meet the allegations of his adversary as he wishes. 3. Bl. 309. 10. 7. Doug 58. Cowp. 575. 7 Burr. 772. An except. See Laws 115. 145. 224. 227.

An Estate in Fee simple may be pleaded or alledged generally; the party is not bound to show the commencement of his estate. But in pleading any particular estate, the pleader must show the commencement of it, that is, he must plead it specially. I have found a reason for this in one Book only, viz. 3 Wils. 72. - it is there said a fee may be acquired by acts of ownership, or long possession, or even by downright wrong; but the party ought not to plead his own wrong to show his title; of course the jury are competent judges of the mode, in which the Estate was created; but they are not competent judges of a limitation or any other particular estate, for the Court is to judge of the matter of law raised out of the particular mode of the conveyance of the Estate. 2d. Ray. 333. Laws 47. (See Supplement note f)

I have anticipated the rule, that in every stage of the pleadings, each party may meet the allegations of his adversary in one of three ways, viz.

1. By denying them & pleading the true issue; 2. By confessing & avoiding them by some new matter. 3. By demurring to them.

This may be done through all the pleadings till a proper issue is tendered & then the other party is bound to join on the issue. 3. Bl. 309. 10. Laws 143. 7. 150. 8. He has no longer

Pleas and pleadings.

an election. When the defend. pleads in bar, the plff. may deny the fact stated there, or he may confess and avoid it, or he may demur to it. The who pleads new matter then must conclude with an averment & not to the jury try. The pleadings are in the following order; the first plea is on the part of the def. it is called the "Declaration". 2. The Def. answer as a "special plea in bar". 3. The replication of the plff. 4. The "rejoinder" of the def. 5. The "surjoinder" of the plff. 6. The "retort" of the def. and 7. The "surretort" of the plff. No chain of special pleadings can be carried further than a surretort. Why in the nature of things it cannot be done is not evident.

One thing material is to be observed respecting this succession of pleadings. In every successive stage of the pleadings, the pleader on each side must support what he has before alleged in his own favor. The plea in bar is to destroy the Declaration. The proper office of the replication is so to answer the plea in bar as to fortify the declaration, & so on thro all the pleadings; and if this is not the case the party pleading is guilty of a variance or departure in pleading. 3 B.C. 310. 4. Bac. 6. 1 Inst. 304. Plow? 20. 2d Ray. 14099. 5 Com. 2. 123. 1 Inst. 304.

In concluding these general rules, I would observe that the judgment given by the Court is always rendered upon the whole record. So that he who upon the face of the whole record, takes together appears entitled to judgment will have it. And the rule is the Court are to give judgment upon the first substantial defect in the pleadings. Thus if the declaration should be bad & the plea

Pleas and pleadings.

in Bar bad, & the plff. should demur to the plea in bar as
bad, the Court would look back to the first defect, & they
would find it in the declarations; the bad plea in bar is
good enough for a bad declaration, for the Defend. need
not have made any answer to the declaration. Suppose
the declaration good, the plea in bar bad, & the repli-
cation bad, & then the Defend. demurs; here the first error
is in the plea in bar, therefore judgment must be render-
ed for the plff. because a bad replication is good enough
for a bad plea in bar. This rule may be applied through
all the successive stages of the pleadings. Hol 199 560 110.
8 Co 120 b. 133 2 4 Co 110 Jalk 173 4 Bac 713.

These are all the general rules I propose to lay down.
It now becomes necessary to attend to the several branch-
es of pleading in their order; and first.....

The Declaration.

And first I am to speak of the Declaration which is
the first stage in the pleadings. The declaration must
show all that is necessary or essential to the plff's right of
action. This is the most general rule. The declaration
contains the whole foundation of the plff's claim. & you
unless the claim is stated in the declaration it cannot be
enforced. Indeed it is said to be a reason for this rule that
the plff. cannot prove any material fact not alleged.
*This is not a reason but I think it is rather a consequence of the
rule. The reason is, the plff. cannot recover unless he shows a right of
recovery. The evidence of this right is contained only in the declaration.
The plff. cannot prove a good right of action under a bad de-
claration. 1 Inst 17^a Plew 84 Hol 199 Saut 68 4 Bac 406 13.

Pleas and Pleadings.

And as on the other hand the plff. cannot recover unless the declaration shows all that is essential to his right of recovery, so neither, if the declaration (being otherwise sufficient) discovers any fact which shows he has not a right of recovery, he cannot *u. f. a. i. o. r. i.* recover. For the same reason also if the declaration discloses any facts which show that at the commencement of the suit, the right of action was not consummated he cannot recover. Bro L. 325. Bro S. 574. Boup 554. Doug 61. 7 T. R. 4.

Thus if the plff. should declare on a Bond, to say in his Declaration, should show that the Bond was not due till tomorrow he could not recover upon it, since his cause of action must exist at the date of the writ. And the Declaration is so radically defective that it cannot be cured in any manner.

Yet it is very improper to say, the writ abates in such case; for that is an appropriate term applying particularly to another part of the pleadings.

The rule mentioned above admits of an exception. The rule is, no man can recover in an action on a contract before the time of performing the contract has elapsed. The exception is this—where one party is bound to perform a contract in future, and disables himself to perform it before the time of performance arrives, he may, be sued immediately after the act of disability. Thus if A. covenants to convey Lands to B. within 6 months and at the end of 1 month conveys the specified lands to a third person for a year or in fee he may be sued before the 6 months have expired. He may to be sure repurchase them again before

Pleas and pleadings.

the 6 month have expired, but this is not to be presumed.

So if a lessee for years covenants that he will at the end of his term leave the timber trees standing & this is the strict time of performance of the covenant; now if he cuts them down before the end of the term he may be sued immediately. 5 Co 20. 21. 22 Sand 397. 7 Co 24. 5. Plowd. 84 Cro. J. 574.

* The omission in the Declaration, of anything which is the gist, ground, or substance of the action is an incurable defect.

The gist of the action is the substance of the claim, the essence of the right to recover, it is that without which there is no cause of action. And the declaration may omit the gist of the action without omitting any material fact.

A. will be entitled to a right of recovery against B. by doing some precedent act himself. After performance he sues without averring performance on his part. There is no cause of action, for tho he has stated some material facts, viz, a contract, & that he has never been paid, but still the material fact of performance is omitted, and this is sufficient to destroy the declaration.

Again upon the principles of the Common Law, if a Dog has done an injury to another persons property, the owner is liable if he knew before hand that the Dog was addicted to this species of mischief. Suppose then the action is brought against the owner of the dog stating every thing except the "scienter"; there is no cause of action. A material fact, which is the gist of the action is omitted, & this is enough. 5 Allox. 305. 4 B. & C. 8.

(See Supplement not. g.)

Pleas and pleadings.

And in case of such an omission as this, the defect is incurable. The Defend. may demur & it will be sufficient; or if he pleads to issue & there is a verdict for p.p. he may move in arrest of judgment, or have it reversed on a writ of Error. A defect going to the gist of the action is incurable; a verdict will not cure it. 3. B. 395. Doug. 658. 4 T. R. 472. 2 H. Bl. 201.

Matter of inducement & matter of aggravation are not the gist of the action. A declaration may consist of, inducement, aggravation & substance. 4 Bac. 8. 5 Mod 305.

The inducement consists of such subject matter as is merely introductory to the principal fact or cause of action, & is always inserted for the purpose of elucidating & explaining how the cause of action arose.

Matter of aggravation is that which goes to show with what enormity or under what circumstances of outrage or hardship the wrong complained of was committed. 3 Inst. 60. 9. 70.

There are rules applying to these matters which will be given hereafter; but I would here observe that in laying inducement & matter of aggravation, the Law does not require the same strictness in form, nor the same certainty in description as in stating the cause or grounds of action.

Lecture IV.

In all actions the declaration must contain what is called a certainty. This certainty is as to parties, time, place and subject matter. All these particulars must be so stated as to be intelligible, that the party may adopt his defence to the real claim of the p.p. This certainty

Pleas and pleadings.

relates chiefly to the mode of making averments, and the meaning is that the allegations should not be loose, vague and ambiguous for three reasons, 1st that the defend. may be know how & what to answer, 2^d that a regular issue may be formed & joined, and 3^d that the Ct. may know how to render judgment. * Plow. 84. 122. 1 Inst. 303. Bro C. 78. T. T. R. 352. 4 Bac 8. L. R. 10 52. 7th Series 82. 7

And it has been decided that the words "said" "aforesaid" do not import sufficient certainty when there are two antecedent subjects to which they are referable, for these words are words of reference. Thus if two counties have been named & the pleader proceeds to ~~name~~ say "the said County" or "the County aforesaid", this wants certainty. This is the case of the subject matter & parties also. Thus in an indictment wherein J. T. was indicted for Burglary and in the reciting part of the declaration another J. T. was named & then the declaration proceeded to state that the said aforesaid J. T. &c. this was holden to be uncertain. You might say in the first or last mentioned County aforesaid. At any rate you must use a word of more particularity. 2 Inst 64 or 66. 2 S. Ray 888. 8 T. R. 178.

But tho the declaration contain certainty, the rules are not now near so strict as formerly. As to the subject matter, the rule with respect to a description of it, was very strict but the descriptions have not been uniform, and many cases are irreconcilable.

In certain kinds of actions greater certainty is required than in others. As in real actions, and according to the old rule mixed ones also, greater certainty is required than in injuries to personal chattels, and the reason is (see Supplement note h.)

Pleas and pleadings.

given is that the Sheriff may know, from the face of the declaration itself, without any extrinsic proof what lands are the subject of the suit, or those of which he is to give possession. 1 Co 55 or 552. Duck 254. 3 Wils 23. 1 Burr 630.

In detinue more certainty is required than in actions for land done to person. Chittels. 3 Ser. 303. 12 Mod 3.

And as to the last instance where damages are recovered for injuries to personal chattels the rule is, - if the description of the thing be such, that the jury can understand according to the common acceptance of language what is meant by the description, it is sufficient. Chittels. 2 Pra 809. Wils 70. 2 Tere 74 and 86. 1 Mod 289. 12 Mod 3.

In replevin the rule is less strict than in detinue. Hardwick 119. 2 Tere 1615.

In the case of ejectment the rule is greatly relaxed. 1 Burr 629.

Where the kind of personal chattel is not specified, the Declaration wants certainty. 4 Burr 2455. 2 Pra 738. Wils 70. Fortescue 57.

According to the current of modern authorities if the want of certainty in the description of personal chattels in an action for the recovery of damages for injuries done to them goes only to their number, quantity, or quality & not to their general nature or kind the defect is cured by verdict - thus a "parcel of threads" a library of books", and "old Iron" are good & sufficient descriptions after verdict in an action of Trover. - And where the thing to be described is more matter of aggravation much less certainty is required, than in things which go to the gist of the action. And any degree of generality in the former, is not objectionable in point of form. 3 Wils 292. 2 J. R. 292. 2 R. B. 555.

Plaintiffs' pleadings.

Plaintiff's case in 3 Co. 54. then cannot be Law, & so the case in 2. S. & Rayn and 14. 10. cannot be Law.

The reason why certainty is required is said to be, that unless it is so, the Defendant cannot plead it on Law to another action for the same cause. This is not the true reason, for it can be pleaded on Law. The reason is stated by S. P. Abbott field to be this "that the Defendant could not otherwise justify, or in other words, it is to enable the Defendant to discover with clearness the precise thing for which he is sued, so that he may know how to adapt his defence to the plaintiff's claim." 4 Burr. 2456 & 2457. ^{see Sup. note (3)}

The Law never requires any greater certainty in the description, than the thing will admit of. 4 Burr. 2457.

If a declaration contains several subject matters, some of which are sufficiently & some not sufficiently described, the declaration will be good, as to those things which are described with sufficient certainty, and for them the plaintiff may have judgment; or in other words, a declaration may be good in part and bad in part for want of certainty. Thus in Trover, A. declares that B. took away such & such articles describing them properly, and also "divers others". Now all the articles described are good, but divers others is altogether uncertain & the plaintiff cannot have judgment for them. The Defendant cannot demur to this Declaration. If indeed the jury give a general verdict and entire damages the plaintiff cannot have judgment, for the Court cannot know for how much to render judgment. The Jury then ought to serve the Verdict; if they choose to give any thing for the surplusage, & then the plaintiff can recover the surplusage & have judgment for the other. 1 Gal. 218. 2 Par. & 379. Com. Pleas. 6. 34. 1 Leon 286 n.

Pleas and pleadings.

When there is a defect in the declaration, and a party cannot regularly maintain it by a plea in abatement. It is not the office of a plea in abatement to attack the pleadings. It reaches the writ only.

Yet the plea in abatement may be founded on a defect in the declaration, as if there is a misnomer over the declaration, or a variance between the plea and declaration; then there must be a plea in abatement, for there can be no demurrer, yet the effect of a plea in abatement is to destroy the writ.

A demurrer is the proper mode of attacking an insufficient declaration, tho' when the declaration is the subject of a general demurrer, a writ of judgment may be moved after verdict. 4 Bac. 8. Fulk. 212. 7, 2 O. Wills. 478. Dares, 177.

In all cases where the Common Law requires a contract to be written, it is necessary in declaring upon that contract to aver that it is in writing. Thus if an action is to be brought on a contract of apprenticeship, the p[ar]ty must state that the contract is by deed, for the Common Law requires that this contract should be by deed. In the case of a release, this must be averred to be in writing.

So if a contract unknown to the Common Law, but created by Stat. is required by the Stat. to be in writing, it must be declared upon as in writing.

As in the case of a devise of Lands. This is unknown to the Common or Statute Law. There was no such thing as a testamentary disposition of real property at Common Law. The Stat. Hen. VIII. creates this right & requires it to be in writing. In declaring on a devise then all the requisites of the

Pleas and pleadings.

Stat. of Frauds & Perjuries must be stated, as that it was in writing & subscribed by three witnesses &c.

But a covenant recognized by the Com. Law, and not required to be written, is required to be written by Statute, it is not necessary to declare it to be in writing. This applies to all executory contracts under the Stat. of Frauds & Perjuries. The reason is, the rules of pleading are rules of com. law settled while these contracts were not required to be in writing. The Stat. does not introduce a new rule of pleading, but a new rule of evidence. Why, then, it may be asked, does not the same reason hold in case of a devise before Statute? Answer, the distinction is correct, because a devise being unknown to the Common Law, there could be no rule of pleading established by the Com. Law. The Stat. of Wills creates a new species of common assurance, not merely a new rule of evidence. 6 Co 38. 12 Mod 540. B. & P. 279. Sack 519

But still if any of these covenants or agreements, contemplated by the Stat. of Frauds & Perjuries and by it, required to be in writing are to be pleaded in Bar, they must be averred to be in writing; because as Justice Buller says, as he has admitted by his plea in Bar, *prima facie*, a cause of action in the p^lff. he must destroy it only by a Bar complete in all its parts. B. & P. 279.

In declaring upon a deed or writing the p^lff. is not bound to set forth any more of it than is necessary to entitle him to a recovery.

It is commonly the case that contracts contain stipulations on both sides. When there are these distinct stipulations some of which are of no use to the p^lff.

Pleas and Pleadings.

the plff. need not state them in his Declaration. The Def. may pray over & take advantage of them if he chooses, by way of defence.

This rule however must be understood with some qualification; for if the stipulation is embodied or incorporated with the particular stipulation recited in the Declaration, the plff. must state it, because it goes to make a part of it, either by qualification or exception. As if a covenant to pay a certain sum in work, provided the plff. does thus & thus. Now here the proviso is incorporated with the cause of action and goes to a description of the thing stipulated. Here is a promise & a condition precedent & they must both be stated. So where one covenants for quiet enjoyment, & the payment of rent; the rule is the same. This class of cases form the only exception to the general rule. Dover 642.

It is a general rule in declaring, that where from the facts stated the law will imply a contract, it is unnecessary for the plff. to raise the promise, or in other words to aver it. As in indebitatus assumpsit, he must state the promise as well as the facts which go to show the foundation of it. * Lans 49. v. Rose 74. 2 L. Ray? 1517. Salk 663.

All Declarations are either,

General or Special.

A general declaration is one which states the cause of action generally. A special declaration is one which states the cause of action with particularity, or all the special facts. In indebitatus assumpsit, for money had & received is a general declaration where it does not. (* See Supplement note 6.)

Plausibility

state the particular facts, or the special manner in which the promise is to be proved; this if all the facts have been stated, it had would have been a special declaration. 4 Bac. 8.

Where an action is brought on the penal part of a Bond without declaring on the condition, the declaration is general & is used both in S. Britain & in Con. 4 Bac. 8. Though the party may declare on the penal part, and on the condition too, & then in his declaration that the condition is broken. This however is an unusual way of declaring. It is like, what Lord Holt says, "leaping before we get to the stile".

An ejectment if the party merely states that he went in under a lease &c. (that is) when he founds upon a title without deducing the title, this is general; but if he deduces his title, is under a lease, it is a special declaration.

Of the Joinder of parties in one Declaration.

There are a vast number of cases, which show the particular instances in which the joinder of parties is bad.

Joinder is where a suit is brought in favor of two or more persons, or against two or more Defendants.

When two or more persons are jointly interested in a right, they not only may but ought to join in any action which may be brought for its violation. 5 Co 19^a. 1 Salk 291. 13 S. 5 Co 18^b. 5 T. R. 651. 1 Com. 10. Co Litt. 154. 1 Bos. 532. 2 M. 696.

And the rule is the same, whether the action is real, personal, or mixed, or whether it sounds in contract or tort. As in the case of joint obligors, or joint tenants. As the right is in him or whos. the violator right is, so it is in them or whom the violator right is. So tenants in common must join

Pleas and pleadings.

Certain persons join in an action of trespass. *Case cited.*

There is however a distinction between the cases of contract & tort, as where the action is brought on a contract, the nonjoinder of a necessary party may be taken advantage of under the General Issue, or it may be pleaded in abatement; because the contract proved cannot be the same as that described in the Declaration. 2 *Fea.* 820. 3 *Tr. R.* 18. 1 *Bos. & P.* 6. 5 *Colb.* 3. *Falk.* 42. 90. *Str.* 1146.

Thus if a parcel promise is made to A. & B. and A. declares upon it alone, he cannot recover in the right of B. who is a party to an undivided moiety of the right. 6 *Tr. R.* 766.

But when the action is founded in tort, the nonjoinder must be taken advantage of in a plea of abatement, & not under the General Issue. As if A. & B. own a House, which is taken on trespass, if A. declares on the trespass alone, an abatement must be pleaded. 6 *Tr. R.* 766. *Black.* 4. 290. *Str.* 1140. 3 *Tr. R.* 551. 651.

In *Falk.* one of the cases cited is against the principle, but that has been questioned, & seems not to be law.

But when a several right is violated, i.e. a right vested in one person only, another person may not join with him in a suit for the violation of that right. This would be a misjoinder of a defect in the declaration. For tho the defend. is liable to the proper person, he is not liable to a stranger. As if A. & B. should sue for a trespass committed on the land of A. alone, this may be taken advantage of in a plea of abatement, & the better opinion seems to be under the Gen. Issue likewise. But this is not clear. *Bro. Eliz.* 143. 1 *Str.* 315. 1 *Com.* 10. 10.

In actions by joint tenants all must join, tho one is under age so that he cannot act, tho he has not proved

Pleas and pleadings.

the will; nay tho he has refused the trust. The reason of this is, the right of the Ex. is so strictly joint, that it cannot be several. The rights of two Executors are identical. The one of the Exec^s may not be compelled to sue, yet he must be named in the suit. Well what is to be done? Why then the suit must be brought jointly and a severance of the Ex. who will not act, may then be made. 1 Tass 291g. Talb. 3. 46. 37. 2 Co 37. Nelson. 130

But there are rights which cannot be holden by two or more jointly, and therefore two or more cannot sue for a violation of them. The right of "personal security" and "personal liberty" never can be joint, tho the "right of property" may be. In the two former cases there can be no such thing as a joinder of parties.

If then the same actionable words are spoken of two persons, they cannot join; the right of one reputation is not the right of the other. The character of each, is his exclusively and no joint right is violated. 4 Bac 10. Crok. 512. B. & P. 5. 504.

I publish a libel of two persons. They cannot join in a suit against me. There is no joint right violated. So if two or more persons are beaten by the same person, they cannot join for the same reason. 2 Wils. 47. 2 Lord 215.

As to the Joinder of Defendants.

The true rule is this. If the cause of action arises from the joint act of two parties, they ^{always} can be sued together. If not, they cannot be joined as Co Defendants. Upon this point, as to the reason of the rule, there is nothing said in the books. Crok. 674. Cap. 504. B. & P. 5. 1 Buls. 15. -

Suppose then two persons at the same time & place, utter the same scandalous words, &c. &c. we cannot sue them. (* See supplement No.)

If each cause is several, I don't think they must be joined.

Plaintiffs and defendants.

together as defendants in one action. My action in speaking³ these words is not your act. There is no joint act in the case. 4 Bac. 511. Telw. 124.

There are cases where persons may be joined, where they unite in the same act; Thus if two persons join in a trespass, they may be sued together; the act of each contributes to give effect to the act of the other. All the acts are considered as one indivisible one. 27 R. 199. Hob. b. 4. Bac 10. Latch 262. 2 Burr. 985

So in malicious prosecution, which is a tort also, they may all be joined. Slander however does not stand on the same ground with a malicious prosecution, slander being a "wrong" merely, while malicious prosecution is a "tort". The fact is, according to Justice B. every cause of action arising "ex delicto" is not a "tort"; and he takes this distinction, viz, In every cause of action arising "ex delicto" there must be some positive act, some degree of violence or force to make it a "tort". Slander arises "ex delicto" but it is merely a "wrong", there being nothing but words spoken, no positive act committed to make it "a tort". But in malicious prosecution, there is something more than words spoken, a positive act is here committed. Altho' Slander is "a wrong" and malicious prosecution "a tort", still they are causes of action of substantially the same nature to be joined on the same suit, for they are both actions on the case.

So if two join in publishing a Libel, they may be sued jointly, for one may write one part, and the other the other part, this supposes a tort, an act done.

In the case of torts the rule of distinction is this;

Pleas and Pleadings.

those acts in which the Law supposes any degree of force, may be committed by two jointly; when this cannot be supposed, it cannot be committed jointly. Sect. 12. R. V.

In enquiring what parties may be joined in one declaration, I observed there were certain acts, which could not be committed jointly, of course an action for a violation of them cannot be brought.

Further. Two persons can never be joined in one declaration as Defendants for distinct torts by them committed severally. Thus if A commits a trespass upon T. & B. afterwards commits a trespass upon T. of the same nature, he cannot sue them together. *Stiles 153.* Here the cause of action does not arise from the joint act of both parties. In case of contracts, if there are two or more persons claiming jointly under a contract, if one of them dies, the ^{Exec.} cannot sue on the contract or join the survivor in an action. The contract being joint the whole remedy survives to the survivor. Thus a bond is given to A and B. jointly, A dies, the whole right of action survives to B. ^{see Supplement Note K.} *1 Bos & Pul. 445. 1 East 497.*

If two or more persons bind themselves by a joint contract, they must all be joined as Defendants on the action. Such is not the several contract of either of them; it is not his, or any individual's contract, but theirs, i.e. the contract of all together. *Talk 313. 2 Vern. 99. 3. Bac 67. Talk 348.*

But if two or more bind themselves jointly & severally, each or all may be sued at the plff's election, for it is the act of each, as well as of both or all.

But if three or more bind themselves by a joint & several contract, the action may be brought against

Pleas and pleadings.

all or one, but it cannot be brought against two; he can-
not sue more than one unless he sues all, for the contract
must be considered as joint or as several. If it is a joint con-
tract, all must be sued. If it is a several contract, only
one can be sued. But he can not ^{sue} the contract as two things
joint & the other thing several. Yelv. 24. 1 Sid. 238. 35. R. 782. 1 Pars. 291.

And if two or more bind themselves together by one
contract, it is joint of course, unless the terms of it imply a
several debt or obligation. It is true the word "severally"
need not be used; other words may be used to show that it
is the intention to be bound severally. E.g. If a promisor
says "I am drawn thus" "we, borrower" &c. - this is a joint obli-
gation. 2 Atk. 31. Chitty 175. 176. 36. 254 5 Binn. 2611.

If A. deliver goods to B. to be delivered over to C. and B. fails
to deliver, A. and C. cannot join in an action against him.
For the each may have a right of action against B. still
it is on different grounds.

This rule is established as it is laid down, but Mr.
Poult. thinks that C. (in this case) has no right of action
whatsoever, for B. is a 9th agent, not C's. and C. is in no wise
privity to the transaction. 11 Bac. 9. 10. 1 Buls. 68. Hard. 321. It
is supposed that if goods are delivered to B. to deliver to
C. that C. must sue on the over. If money, then the action must
be in deb. assumps. Chitty 220. 1 Pow 343. 353.

And as upon a contract which is joint with respect
to obligees, when one dies, his Exr. or Adm. cannot sue
alone or with the survivors, so on the other hand if two
persons bind themselves by a joint contract and one dies,
his Exr. is not liable to be sued in a suit with the sur-
vivors.

Pleas and pleadings.

surviving obligor or debtor. At Law he cannot be sued after the death of the survivor. It is the nature of a joint trust and a joint duty to survive entire to the surviving party.

But if two bind themselves by a joint & several obligation, the Exor. or Adm. of the deceased obligor may be sued alone, but he cannot be joined with the surviving obligor. 1 East 400. So if there are two or more joint and several obligors, the representative of the deceased may sue on the obligation.

As to suits against Executors the rule is, the action must be brought against all, who have administered; and not against those who have not administered. There may be three Executors & one refuses, the Creditor is to bring his action against the two who have administered. This is different from the rule where Exors sue. But here no harm is done, he is liable to no costs. But in this last case, when they are sued if the Exor. who refuses the trust does not appear. He & Co. will go against him, & he will suffer without a possibility of exoneration. Besides where Exors are sued, nobody knows who they are till they have administered; Com. Abat. 8. 10. 1 Ser. 161. 3 V. R. 557. 1 Pant. 271. q.

Of the Joinder of different causes of action in a suit.

Some causes may embrace several distinct causes or grounds of action; and others not.

And here the general rule is, that several causes of action being of the same nature, may be joined in one declaration, between the ^{same} parties. Thus if A holds two pieces of land B. he may sue on both of them in one declaration; and this Court will count as two counts. 4 Bosc. 11. Com. 6. 294. Ninty 140. Com. 11. q.

Pleas and pleadings.

By this rule (it is said) is meant, if several causes of action require the same judgment at com. law, they may be joined in one declaration. They are said to be "of the same nature" (as is proved in a former rule) when they require the same judgment at com. law. 5 Bac. 191. 1 Bac. 30. 2 Wils. 319. 1 Inst. 366.

For the purpose of understanding this rule, it is necessary to know that at com. law in all civil actions, there were two kinds of judgments, one a "misericordia" and the other a "capiatur pro fine". Under a misericordia the party is not amerced, and his person is not taken to respond to the judgment. Under a capiatur he is seized and his body is arrested to pay the fine. In all cases committed "with force" the civil injury is connected with a public wrong and of course the judgment is a capiatur. In all cases laid with "force and arms" the judgment is a capiatur; where it is not laid with force and arms it is a "misericordia"; or in other words where there can be no force presumed, if the plff. has judgment, it is a misericordia. This rule is not universally true, tho it is generally given in the Books. 1 Wils. 252. 1 St. R. 276. Doug. 552. 1 Hble. 147. Geo. 20. 316.

It is universally true however, that if several distinct causes of action, require the same judgment at com. law & the same plea or general issue, they may all be joined in one Declaration. As where A. has several Bonds against B.; the issue in all is "non est factum"; therefore they may all be declared upon together. So if one has several covenants, by deed, they may all be joined.

If one is entitled to a recovery on several parcels, upon the issue in all is non apt. & the judgment is a misericordia. 1 Wils. 252. 1 St. R. 276.

Pleas and pleadings.

And to go further. If one person has committed several trespasses with force, against another, these trespasses may be joined in one declaration, and so may several actions of Trover, for the judgment is a capiatum and the general issue the same. So several actions of trespass on the case may be joined in one declaration; and so may several actions of Trover; Trover with negligence may be joined, as against a Bailor. Trover & Slander may be joined, and so may Slander & malicious prosecutions. 3 Co. 7. 2. 2 Bl. 66. 843. 1 Wils. 252. 2 Wils. 319. Comb. 232. 3 East. 70. 1 Wms. 223.

But these examples of the admissibly joinder of causes of action are those where the judgment and the general issue are the same. But where the judgment only is the same, the causes may be joined. This is not universally the case, but it is sometimes. Thus Debt and Detinue may be joined in one declaration. The general issue in debt is "nil debet" in Detinue it is "non detinet"; but the judgments are the same, and they both arise "ex contractu". Debt on Bond and debt on simple contract may be joined; but the general issue in the two cases is different. Twif classed detinue under the head of torts, and was led so to do from the idea that Trover was a tort, and that it was substituted for detinue, but it is improperly classed. 4 Bac. 11. Bro. 20. 316. 1 Wms. 366. 1 Wils. 47.

To exemplify the negative part of the rule. Trespass and contract can never be joined in one declaration; both the general issue & the judgments are different. 3 Bac. 10. 1 Bac. 30. 21. 1 Wms. 42.

By the way, I forgot to mention the true reason of

Pleasure pleadings.

the rule. It would introduce endless confusion into judicial proceedings to join all causes of action in a suit, because there may be often as many different pleas required as causes of action. Suppose a real action is tried there is one general issue; trespass is inserted in the same declaration, here is another general issue &c. The Law permits the joinder of several causes of action, where it is convenient, without complicating the advance of Justice...

Trespass, & trespass on the case, arising "Ex delicto" cannot be joined in one declaration, because the judgments are different. Neither can case & contract be joined; here the judgments are the same but the pleas are different, and so are the nature of the actions. Trespass & debt on Bond cannot be joined. The pleas are different. Sent 2 H. 5. Mood 90. 1. but 366. 2. Ray. 233. S. Ray. 58. 2. Bur. 1114. 2. Wils. 319. C. with 189.

It is true, in general however that several actions or causes of action in trespass, or the same in case, or the same in contract may be joined together, yet to each of them in its particular case may be different.

This is not however universally true. There is at least one exception, and I do not know but more; that is, debt and account cannot be joined in one declaration. The action of Account — is altogether "sui generis". The general issue is different; the proceedings in the two actions are different. Indeed in account the proceedings are altogether different from any other action at Com. Law. In debt the cause is tried by a jury; in account, the first issue is indeed tried by a jury, but then the cause goes to arbitrators who finally determine it. The judgment

Pleas and pleadings.

judgments then are different, for in the count there are two judgments.

Can outster and Assault & battery be joined in one declaration, since the proper action to the first is judgment of to the last, trespass vi et armis? This question has been much agitated, but Mr. Gould thinks without any good reason, since it is apparent in all the modern reports that the judgment & the pl. are the same in both. Hob. 249.

In Conn. the general issue is not the same in judgment as in discovery, yet judgment is the same in both.

It may be observed that the Stat. Edward II. (5 W. & Mary) did away the distinction between the judgments in Great Britain; still the difference is kept up between the causes of action as formerly; for the plff. now pays a fine on the nature of a writ when he takes out a writ sounding in trespass vi et armis.

The distinctions upon this subject are not settled by any general rule. There is very little difficulty arising from it, however because examples are so numerous; yet there is no positive rule, except the universal rule which will apply in all cases. As it is a general rule & not an universal one, that where the judgments are the same, and the converse not precisely true, there is no rule that will apply to every case that occurs.

In Conn. Mr. Gould thinks we ought to preserve all the distinctions as in Great Britain.

The distinctions then appear to be these. 1. When the judgments & pleadings are both the same, those always may be a joinder of different causes of action.

Pleas and pleadings.

2nd. Where the judgments are the same, they may generally be joined tho the pleas are different, but this is not always the case. These are the only two affirmative rules. 3rd. On the other hand, where the judgments are different there never can be a joinder; a fortiori where the judgments & genl. issue are both diff. there never can be.

The only chasm is in the second affirmative rule; it admits of as many exceptions as the cases coming within it. 3.
Non-joinder of causes of action in one declaration.

The joinder of different causes of action which cannot be joined is an incurable defect, therefore the Deft. may demur to the Declaration upon ground of Imjoinder.

And here a distinction is to be observed. Misjoinder of parties has been often confounded with duplicity in pleading. Misjoinder to be sure amounts to duplicity, but it amounts to more than duplicity. Duplicity is a mere fault in form, and can be only taken advantage of by special demurrer. Misjoinder is an incurable defect. The real distinction is this.

Misjoinder of actions, consists in joining in one declaration distinct causes of action, which cannot be joined as distinct, substantive grounds of recovery.

Duplicity in pleading consists in inserting causes of action, which cannot be joined, to enforce one entire, indivisible right of recovery. The latter is a mere fault in form. The former is a radical defect.

Suppose A. sues against B. in his first count, in debt on Bond, and in the second, alleges a Battery.

Pleas and pleadings.

here in the nature of things the second count cannot be inserted for the purpose of enforcing the first count. Then there are two distinct causes of action inserted for the purpose of enforcing two distinct substantive grounds of recovery. This is a misjoinder of actions.

On the other hand, A. lends a horse to B. he brings an action upon this bailment, stating the contract express or implied, and then avers that the defend. abused the horse wickedly in maliciously. Now this abuse sounds in tort, still he declares first upon a contract. This declaration is double. He charges him with a wrong. This however is all brought to enforce one right of recovery. Then there is duplicity in pleading.

Trespass and trespass on the case ex delicto cannot be joined; yet it seems that a declaration in trespass, beating his house, destroying his goods, & beating his servant. "per quod servitium amisit", is good. In the first place you will perceive this is all one continuous trespass, but there is another reason; according to the English form of proceedings an action per quod servitium amisit is usually accompanied with trespass with force, tho' they are substantially different, yet the per quod is rather matter of aggravation than any thing else. I should go on principle farther than this. It is strictly proper to join without saying a "per quod", because the beating will be considered a more matter of aggravation as to the original trespass. This may be questioned. 4 Bacter. 260. 313. 57. 6. 341. Tarr. v. Hines ab. 9. East 388. 6 Wall 113. 35 C. 392. 176. 56. 555. 27. 6. 167. Stiles 43. 252. Stee 43. 200. Sack 10. 342. Exp 407. 316. 20. 176. 10. 555. 108. Wall 436.

How are pleadings.

When several actions are brought for several things of the same nature, the Court before which they are pleaded may compel a consolidation of them; i.e. may compel a joinder of them in one Declaration in several Courts. This is more matter of discretion. It is done, when done at all, for the purpose of preventing vexation. Thus suppose A. brings two actions on notes of hand agt. B. the Ct. may compel A. to drop one suit & join both in one. ^{the Ct. is to pay the costs, for the suits are considered as variations} declaration in two Courts. ^{9th July, 1846, p. 12, 196.} Yet an affidavit that there are several defences, so that the trial would be embarrassed by all being joined, will induce the Court from compelling a consolidation of them. Comb. 244. 2 Pra. 1149, 1078. 2 J. B. 639. Com. 111.

Miscellaneous rules respecting Declarations.

The Declaration should always agree with SECTION VII. the writ. The writ is the foundation of all the proceedings; since it is that which gives the Court authority to hear the cause. If then the writ is in error in the writ to answer a trespass and in the declaration is called to answer to trespass on the case (without an "or else") the variance is fatal. Booth, 1 P. D. 84. 600 L. 325. H. 6. 180. 177. 4 B. & C. 12. 13.

When the plaintiff's right of action is to accrue by the performance of some condition precedent on his part, he must aver performance of that condition on his part in his declaration. The omission of this is an incurable defect and cannot be cured by a verdict, because it goes to the gist of the action. The plea discloses in his own declaration that he has no right of recovery. (Much learning is to be found in the subject of precedent & subsequent conditions in L. R. 638. in the case of Shochem v. The East India Company, 7 C. 10. 17. L. 645. 2 L. 519. 2 H. 355. 74. 75. 125. 5 Com. 65. 7 & see Supplement note 6.

9th Nov. 1846, p. 249, 250

Pleas and Pleadings.

But there is a material distinction to be observed with respect to the rule of pleading, where there is a condition precedent, & a condition subsequent. For where the plaintiff's right of action is qualified by a condition subsequent he is not bound to take notice of the condition. It is matter of defence merely and must be pleaded by the defendant. The right of action does not accrue by the performance of the condition. 7 C. 10. 12. R. 638. 2 Esp. 293. 17 L. J. 254. 2 D. 574. 4 T. R. 65. —

To all if there ~~are~~ is one contract, reciprocal, i.e. independ-
ant, covenants or promises, the performance and non performance
of the covenants or promises on his part. This is directly the
contrary where the covenants are dependant, for then he
who sues must aver performance of the covenant or prom-
ise on his part. Cro. S. 645. Com. b. 265. Hob. 88. 1 Bos. C. 359. 2 Mass. 509. 5 C. 10. (West 1777)

In the former case it is covenant for covenant, or promise for promise. The one is in consideration of the other. A. covenants in consideration of the covenants of B. in the same declaration, and B. covenants in consideration of the covenants of A. in the same declaration.

But suppose A. & B. enter into mutual stipulations so that A's covenant is consideration of B's performing his covenant, and B. in consideration of A's performing his covenant can do, here whichever of the other must own that he himself has performed, or has tendered performance.

Those facts, which constitute the gist or substance of the action, must be expressly and positively alleged; not by way of recital. As in the case. Therefore where the p.p. says, "whereas the deft. refused to pay this w. to me, for the sum of \$100. w. he," "whereas he did not" &c. - p. 22. q. 2. p. 48. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846.

Pleas and Pleadings.

Formerly it was held that an averment of this kind, was a radical defect and not cured by verdict. State this not now to be law. It is certainly good after verdict and the general ~~opinion~~ opinion is, that it is bad only on special demurrer, and is not the subject of a general demurrer. The old cases on pleas are much more strict, than the modern ones.

But this rule does not hold as to such facts as are not traversable by plea, however essential they may be, and this inference I make from the established form of pleading in a great variety of cases. In assumpsit, it is the established form of pleading that the consideration is stated in way of recital and not by direct averment. The consideration in assumpsit cannot be traversed by plea, because it would amount to the general issue. To traverse possession in the gist of the action. But the plaintiff never need state that he was possessed of such goods; he may state that "I demand" and this is not traversable by plea. Hence it is to be clear that the rule does not hold as to such facts, however material which are not traversable by plea. They need not be stated directly & positively. 1206 5. 18. 4. Co 18. 10. Co 77. Plea 2. apt. 108. Co 116. 1. Law 169. 702.

How does the general rule hold as to mere matters of inducement (and by the way they are not in themselves of the essence of the action). The rule does not in its terms extend to inducements, ^{if they are not traversable} 4 B & C 13. 14. (Pp. 177. 716. 75.)

The subject of the suit must be described in the declaration with certainty. See rules above with regard to certainty in pleading.

It is said to be sufficient if the jury can learn what is

Pleas and pleadings.

meant. Thus in Eng. the sides and bounds of a field are not described as in Conn., but only the place where it lies.

It has also been held that "crown brought for" "Thips and sails" was a sufficient description; the crown brought for "some fish" or "for some pieces of linen" was not deemed bad. But for a library of books it was held a sufficient description. But this is quite too loose & vague. The decisions are somewhat arbitrary.

If the declaration is good in part and ill in part, it is not for this cause demurrable. The plff. may recover for that part which is good. Thus if the plff. sue on two bonds and it appears on the face of the declaration that one is not payable, or that it is void; the declaration is not demurrable, for if he can recover on either of the bonds, that count is good, and on it he is entitled to judgment. 12 Jan 1879
Hob. 178. 1 Conn. 784. 5. 10. 115. 12 Bay. 395. 4 Conn. 45. 7. 12. 395. 200 104. 11 Conn. 286. 28.

This rule however seems to me in its nature to be confined to those cases where there is one entire cause of action ^{well} demurrable on. For if the Declaration is ill in one part when all the parts make but one cause of action, the declaration is demurrable, for all the parts except mere surplusage are necessary to constitute one ground of action. The declaration is ill as to entire cause of action.

Thus there are distinct demands in one declaration one of which is good, and the other ill, the this declaration is not demurrable, yet if the plff. obtain a general verdict and entire damages, judgment must be arrested. Thus in an action for slander, for two distinct sorts of words, if one part is bad and verdict is found

Platanus plicata Desf.

entire, judgment must be arrested, for the Court cannot determine how much was given on the false row.

B. & H. 78, 106, 130, 366, 177, 2 Burr 985, 226. 506, 318, 127, 6508, 532. Fack 384, 532. n. d. 178.

And here it is necessary to explain not only the true reason of this, but the distinction between this and common cases of arrest of judgment. You know it is a general rule of pleading that every defence which will support a motion in arrest of judgment will support a general demurrer. But here arrest of judgment takes place and yet the declaration is not the subject of a general demurrer. How is this case reconcilable? The answer is easy - The rule above laid down relates to insufficiency in the pleadings. There is no such insufficiency in the present case. The declaration is good. The insufficiency is created by the verdict. It is arrested for defect in the verdict. There is then no difficulty in reconciling the cases.

You perceive then according to the true spirit
of the rule, when the Ct. can determine after verdict
from the face of the record the precise amount of cast
distinct down and, judgment will not be arrested, al-
tho there is one bad count. Ho. 178 Bon 311 *pladen* 322. C. 26. 759 p. 3.

If the Jury should assess greater damages than the plff. demands, this will not of course destroy the declaration or action. In that case the plff. may release the surplus, and take judgment for the residue - or the Court without a release may give judgment for the sum demanded. The Jury are not authorized to give more than the plff. demands, for the plff. has not been called to answer to more than a certain amount. Ex'or. v. The Mayor 10 Mod. 127. 10 Mod. 127. 2 B. & C. 223. 2 B. & C. 223. F. & B. 107. Hard. 55. Moore 8. 10 Geo. 115. 2 B. & C. 223.

Pleas and Pleadings.

The rule is the same if the plff. demands more than by his own showing he is entitled to, if the jury give more than he is thus entitled to. Then he may release the excess and take judgment for the residue. This may often happen in actions on contracts. The rule of damages on Bonds is the debt and interest. The jury can give no more. If then the plff. demands more than this and the jury give it, he may remit the excess, or the Ct. may do it, of course. - 1 Rose. ab. 785. 4 Bac 26. Esp. 304. 2 T.R. 113. 123. Hild. 175.

A declaration may be cured by a plea in Bar, even if it is faulty in substance. This was treated of before us. See the general rule of Pleading. Com. Dig. Plead. 6. 85.

We now come to treat of the pleadings, which follow the Declaration. These consist of those allegations which the Defend. makes by way of defence, and those which the plff. makes by way of answer to the Defendants defence.

Pleas are of two kinds,

Dilatory pleas.

and...

Pleas to the action.

Dilatory Pleas.

Dilatory pleas are used for the mere purpose of delay, & filed without any foundation in truth whatever. And if an issue on fact was taken on them it went to the jury.

But now by the Stat. 4 and 5. Ann. no dilatory plea can be admitted without an affidavit of its truth in some circumstances. That matter is induce the Court to believe it to be true. And this affidavit is made under the pains & penalties of Perjury. 3 Bl. 363. 3 Hild. 51. 4 Bac 35. vol. 31 Com. 2.

Pleas and pleadings.

In common law we have no such Stat. as this, and have no need of any, because pleading a false plea here is answer no purpose, because it could not, of course, procure an imparlance.

Our Stat. requires that all dilatory pleas shall be tried at the common law. i.e. of the term, of course it can procure no delay. Indeed in the 6. P. they are to be given in, heard and determined within three days after the commencement of the term.

These dilatory pleas are subdivided into three kinds... I shall pursue the division of Blackstone. It is the most simple & best calculated to give a just idea of the subject. They are I. Pleas to the Jurisdiction of the Court, II. Pleas to the disability of the plaintiff, and III. Pleas in Abatement, & these in their order; and

I. Of Pleas to the Jurisdiction of the Court.

The causes of this plea are various. It is a ground of objection to the jurisdiction of a Court of limited jurisdiction that the cause arose out of the local limits of that Court. This rule in Com. applies only to the Cts. of incorporate Cities. South. 11. 1. Bac. 5. 3 Bla. 301. Salk 544. 1 Leon 3. 2 Bulst. 207.

So also if the Defend. has any privilege by which he is not bound liable to be sued in a particular Court, or any other than a particular Court. If then he is sued in any other, this plea may be put in. This has been considered as a plea to the person, but it is not. As in the case of Attorneys where the Court of which the Atty. is an officer has not cognizance of the "subject matter" he may be prosecuted before any other Court. So this

Pleas and pleadings.

a plea to the jurisdiction or to the person? Clearly to the former. The plea is, "I am an officer of another Court, therefore this Court has no cognizance of my person. I am not bound to answer your complaint here."

In Con. there is no such privilege.

This privilege of Attorneys holds only in actions brought ag. them in their own right, and not, "in *alteri* droit". Thus, if an action is brought ag. an Exec. he is suable just as any other Exec. is. He is sued in right of his testator, and he cannot communicate his privilege to the assets of his Testator. 4 Bac 367. Cro. 6. 585. Salk. 2. 166. 12.

So if he is sued with another who has not the privilege, he loses his privilege. This privilege is not communicable. His Co. Defend. is liable if so must he be.

3. Another ground of exception to the jurisdiction of the Court, is the want of cognizance of the "subject matter" of the suit. Thus if a person is indicted for murder in the Court of C.P. he may plead to the jurisdiction of that Court; or when one is sued in a real action in B.C. the same plea may be used. It is to be observed, the Defend. need not plead, in this case, to the jurisdiction of the Court, for the proceedings (if any are had) are "*coram non judice*" and therefore void. If therefore the Court act, in such cases, they act "*extrajudicially*". 4 Bac 35. 10 Co 68. Vent. 333. East 252.

When there is a want of jurisdiction arising from some personal privilege of the Defend. or the cause of action arises out of the local limits of the Court, the Def. must plead it, or he waives it; where the subject matter is not cognizable by the Court, it ^{must} not be pleaded,

Pleas and pleadings.

for the Court are bound "ex officio" to notice it. (vide title of "False imprisonment" for authorities.)

Anciently no action whatever Lecture VII. could be tried, except in the County where the ^{cause} action arose. This is not now the case as to Courts of a general Jurisdiction. It is therefore no ground of exception to a Court of General Jurisdiction that the cause of action (where the action is transitory) arose in a foreign country. The forms of pleading correspond indeed with the old strict rule of the Com. Law, and the cause of action is alleged to have arisen in the County, but a "videlicet" is always inserted. This obtains only in transitory actions.

But as to local actions it is otherwise. Thus where the judgment at Law acts in rem, it is impossible for the Court to try it, if the subject is in another County. As in ejectment. The rule is the same also in criminal cases. The Penal Laws of every Sovereign State are strictly local; of course the cause of action is strictly local.* Cowp. 161. 175. 181. 2. 26. Bl. 145. 161. 2. 126 Bl. 146. 79 (Hutty 25. 1792 Sav.)

Personal actions are generally transitory, and mixed actions are local. The first follow the person of the parties.

Objection to the jurisdiction is regularly the first plea in the order of pleading on the part of the Defendant; for the exception when necessary to be taken by plea is waived by any other plea. If then in a case where a want of jurisdiction might be pleaded, another plea is put in, he submits to the jurisdiction. Inst. 127. Hob. 169 4 Bac. 728. Bur. 35. 1 Con. 5. 6. 2 Cr. 172.

But there are cases where the Defendant cannot give jurisdiction.
* See Supplement m.

Pleas and pleadings.

jurisdiction; and there are where the Ct. have not cognizance of the subject matter, & also in local actions.

According to the English practice, a plea to the jurisdiction is always to be signed by the party himself, and not by his attorney; because if done by an atty it is supposed to be done by leave of the Court, & asking leave acknowledges jurisdiction of the Ct. All other pleas are regularly signed by the atty. 6 Mod 146. Barnes 190. 3 Bla. 303. 4 Bac. 35.

In Conn. we do not make this distinction. The atty signs this as well as any other plea. The rule is somewhat artificial & can be of no use.

This plea concludes to the cognizance of the suit, by praying judgment whether the Ct. will have further cognizance of the suit. The form is - "And the said A. B. prays judgment whether &c." 3 Bla. 303. Falk 278. Laws 109. Sect 303.

In Conn. where an action is dismissed on a plea to the jurisdiction, costs are taxed in favor of the Defendant. When it is dismissed by the Ct. "ex officio", no costs are given.

It seems to be questionable whether the Court can render judgment for costs, where it has no jurisdiction of the suit. It has no right to render judgment except for that which is indispensably necessary. This practice, I believe says Mr. Gould, is indefensible. It is said the allowance of costs is intended to prevent the Defend. from suing the plff. for malicious prosecution. But this cannot be effected. The costs taxed are not a rule of damages, nor are they an actual indemnification. Besides the Defend. ought to have a right to have his costs taxed by a Jury.

So far of pleas to the jurisdiction.

Pleas and pleadings.

II. Of Pleas to the disability of the Plaintiff.

The grounds of the plea are various, especially in England.

1st. Outlawry, of the plff. is a good plea to his disability. This is a title unknown to our law. It is practised upon however in the State of New York.

The outlawry of the plff. until reversed or pardon obtained is a good plea to the disability, because the outlaw is so far out of the protection of the law, that he cannot enforce his rights in a Court of Justice. 1 Bac 2. 4. Bac. 35. 1 Com C. 3. 3 Bac 671. 762. Sill. 197. 60 Sill. 128.

This is not however an actual abatement of the suit. It is only a temporary impediment, for when a pardon is obtained, or the outlawry is reversed, he may be called to answer in the same suit, if the cause of action is still remaining. 4 Bac. 35. Laws. 102. 3.

This disability extends only to those suits brought in his own right, and not to those brought in the right of another. As if he sues as Exec. it is no objection that he is an outlaw. The outlawry is intended as a punishment for him. But if it might be plea to an action brought by him as Exec. the punishment would fall upon the creditors or representatives of an innocent man. 3 Bac 762. 1. 1105. 128.

But in actions brot by Exec. or Adm. the outlawry of the deceased testator or intestate may be pleaded, for here the disability goes to the person whose right is to be enforced. The testator could not transmit to another the right to prosecute a claim, which he himself could not enforce. 1 Com C. 5. 6. 2 Atw. 1604. 1 Com C. 6.

But tho an outlaw cannot bring an action on his

Pleas and pleadings.

own right, he may be sued as any other person. The outlawry is intended to deprive him of his civil rights, and not to furnish him with an immunity. 3 Bac 761. 1 Sid 60. 11 Mod 101.

This disability is always pleadable as a dilatory plea, and sometimes may be pleaded in Bar. The rule of discrimination is this - when the cause of action is forfeited by the outlawry, the disability may be pleaded in Bar, as well as a dilatory plea. As in Felony, where the action concerns his goods, chattels, lands or tenements; for they are all forfeited by the outlawry. On the other hand, where the cause of action is not forfeited by the outlawry, the objection can be taken only by way of dilatory plea, and this is always the case where the damages are presumptive, as in slander, malicious prosecution &c. because these causes of action cannot be forfeited; they are unalienable; and even where the damages are not presumptive, if the action concerns property of the property is not forfeited, the disability can be pleaded only as a dilatory plea. 1 Bac 14. 3 D. 761. 5 Co 109. 1 Inst. 29. 128. 7 Co 29. Dyer 227. Larc 35. 104.

2nd. Excommunication. This is a second ground of pleading to the disability in Eng. This prevents the plaintiff from suing in his own or in another's right; as he is supposed to be unqualified to dispose of goods, or "pious uses" which was formerly done by Exec^{rs} & Adm^s. And this rule holds now in S. B. This plea does not abate the writ, but merely discharges the Defend. sine die, liable to answer to the same writ when absolution is obtained. 1 Bac 3. 4 Bac 24. 2 D. 319. 1 Keil 883. 60 Sil. 133. 4. 6 Co 63. 11 Mod 308.

Absolution is the only good replication to this plea.

Pleas and pleadings.

Here again we see how dilatory pleas differ from pleas in abatement. 2 Bac 320, 320.8. Co. 3. Ill. 133. 4.

This species of disability is unknown in the U. S. 3d. Alienage. A third ground of pleading to the disability of the p^{ty} is alienage. This is sometimes pleadable to the disability, but not in all cases. For the purpose of considering the subject we must look at the distinctions on the subject of Aliens.

An alien friend if not naturalized or made a denizen can maintain no action real or mixed. But an alien friend may maintain personal actions. The reason of the former rule is, he cannot hold Land. The policy of the Com. Law is such that he cannot, but every real action is for the recovery of Lands. & as he cannot hold Lands therefore he cannot recover them. But an alien friend may hold personal property, therefore he may maintain an action for it. In actions that are real or mixed, it is a good ground of defence, that the p^{ty} is an alien. In personal actions it is not. 171. 3. Bl. 384. 1. 3d. 4. 276. Bl. 162. 2. Pra. 1082. or 10. 82. 1136. c. 371.

In Kirby 413. a strange decision. Not Law however. The distinctions now taken relate to an alien friend.

On the other hand it is a general rule that an alien Enemy can maintain no action whatever, either real, personal or mixed. An alien enemy unless a prisoner of war can hardly be in a situation to bring an action. But a prisoner of war can maintain no action generally before Courts acting under authority of that Government, which holds him a prisoner. By this I see Supplement note 11.

Pleas and pleadings.

you will not understand that the personal rights of a prisoner are destroyed. No, the public will punish one who violates his rights. The reason of the rule is founded on a State policy, because the recovery of their debts tends to strengthen their adversaries, and enlarge their resources. Stra 1082. 1 Bos. & Pul 163. 6 T. R. 23. 49. Doug 626. or 649.

There is an exception to the rule of an alien enemy; for he may maintain an action on a ransom, even tho he be made a prisoner with his hostage, & this under the Law of Nations, recognized by the municipal regulations of every Government. Indeed if this were not so, their ransoms never could take place. Good faith and honesty between sovereign States wd. be done away.

A celebrated and interesting case is reported in Coffin 181 where it was contended that no recovery ought to be had, because the alien enemy, who brought the action was a prisoner of war. that the hostage & ransom bill were both retaken & therefore no longer the enemies property. But Sid. Mansfield in a learned argument overruled every objection & decided in favor of the alien enemy. Doug 619. Conf. 161. 3 Burr. 1734.

So also an alien enemy, residing in a nation at war with his own under a licence, protection or safe conduct from Govt. may maintain personal actions. But in this case he is not an alien enemy, quoad hoc he is a member of the State and an alien friend. 2 Ray 282. Salt 46. Stra. 1082. 8 T. R. 166. 181.

Whether an alien enemy, not residing under a licence, protection &c. can maintain an action in right of another as Exec. or Adm. seems to be doubtful. The point

Pleas and pleadings.

has never been judicially settled. Reasons of Policy are against it, and reasons of justice are greatly in favor of it. Sometimes the former reasons are also in favor of it, for the assets may belong to the subjects of the Country where the action is brought. An alien friend may hold leases as Exec. but in his own right he cannot of course; if he bring an action as Exec. to recover a leasehold, his alienage is not pleadable to his disability. Cro. 5. 8. 10 Jac 84. Cro. 8. 142. 683.

4th. Premunire, popish recusancy, attaint of Felony, and being a Heathen or professed are all disabilities in Eng. but as they are unknown in our Law nothing will be said of them. 3 Bla 301. 1 Leon 7. 4 Jac 36. 148. 4. 130. 380.

In some of United States there is however, attaint for Treason or Felony, but it is not certain that in those States this is a disability. At any rate it can be of no consequence to us.

5th. Cverture. Another ground of pleading to the disability of the p^{er} is cverture. This happens where a feme covert sues alone without her husband; the Def^t. may plead to the disability & defeat the suit. The distinctions on this subject are all to be found under the title "Baron & Feme." 4 Jac. 39. 160. 132. 1 Bla. 443. 4.

I would merely observe the husband must always be a party to the suit, where it is brought to enforce a right of his own. True there are exceptions, as where the husband is civiler mortuor. The reasons of this are given in our author. Title. 37. R. 631. Laws 105.

The cverture of the p^{er} is pleadable only as a disability.

Pleas and pleadings.

dilatory plea. It cannot be pleaded as a plea to the action. This is not a plea in abatement as said by Lord Kenyon. It differs from it in form & effect. 38 R. 361. 4 B. & C. 44.

And generally whatever may be pleaded as a dilatory plea, cannot be pleaded to the action. This is not an universal rule. 6 D. R. 768.

And if a feme sole marries pending a suit, the deft. may plead it to her disability. However if the time for pleading it as a dilatory plea has elapsed, it may afterwards be pleaded, because the grounds of exception accrued after the proper time of pleading. 10 B. 316. 4 B. & C. 39.

In some cases this rule is abolished, by Stat. The husband may appear, suggest the coverture on the record, and go on with the suit. Stat. 577.

6th. Infancy. That the p. is an infant, being without his Guardian or next friend is pleadable to his disability. An infant cannot appoint an Attorney, because he cannot make a power of Atty, & because he must appear by Guardian or next friend. 3 B. & C. 148. 149. 3 B. & C. 301. 1 Inst. 135. b. Lamb. 123. Palm 296. 1 H. & C. 287.

Once more. It is said to be pleadable to the disability of the p. that he is not in esse; that there is no such person in *reum natura*. This objection should be taken rather to the action, because pleading to the disability supposes that the p. is in existence. 2 Inst. 109. 3 B. & C. 301. 1 B. & C. 44.

These are all the enumerated grounds of pleading to the disability of the p.

These pleas conclude to the person of the plaintiff.

Pleas (and) pleadings.

When the party pleads judge. of the said 12th (18th), ought to be answered. 3 Bla 303. Lawes 109.

Lawes makes a distinction between a permanent disability & a temporary one. In the former case, the form is as above; in the latter the plea should be; "and the said ch. prays judge. that the plain^t may remain without day until &c. Lawes 103. 9. Tit. d. 885. Lecture VIII.

III. Of Pleas in Abatement.

The word "abatement" in law denotes prostration or demolition. As in the case of a "insurance". To abate a writ, then is to abolish it. 1 Inst. 134. 6. 3 Bl. 301. 2. 3.

Pleas in abatement extend generally to the writ only. Mistakes in the count or declaration can be attacked by pleas of a diff. kind. 3 Bl. 301. 1 Bac 15. Salk 298. Carth 172. 3 Inst. 351. 64.

This rule tho generally is not universally true. It is universally true that a plea which goes to the writ only, is always a plea in abatement; but converso, it is not universally true, that a plea in abatement cannot extend to the declaration; for if there is a mismatch in the declaration, or a variance between the writ and declaration, abatement may be pleaded. 3 Bac 824. 3 Bla. 301. 2. Lawes 105. 5 Mo 132. 144. 1 Com 43. 30. 4 Bac 8.

And in Com. we have a practice of pleading on a batement to a variance between an instrument declared upon & the description of that instrument in the declⁿ.

In Com. there is not the same distinction between the writ & declaration as in England.

In Com. the writ consists of that part of the record,

Pleas and pleadings.

which precedes the statement of the facts or cause of action. And the writ contains all the part of the record from its beginning, to the statement of the action.

"Whereupon" commences the declaration which contains the statement of the facts. The date is common both to the writ and declaration.

The signature of the Clerk or Magistrate, the recognizance for prosecution, and the certificate of the day of the duty, all belong to the writ. These you will observe are no part of the pleadings.

In all pleas in abatement, the greatest precision & accuracy is required. The reason of this is, pleas in abatement are not favoured; they are odious in the Law; they do not dispute the cause of action, but only the form in which the claim is prosecuted. Hence the least inaccuracy in a plea of abat. is fatal. It is said, it must contain certainty, to a certain extent in every particular; i.e. there must be the utmost certainty in it. 2 B. & P. 185. 6. 5 B. & P. 487. 2 Lawes. 55. 6. 107. 132. 8 B. & P. 167. 276. 130. 550. Com. Dig. Abatement. C. 11.

Causes of pleading in Abatement. These causes are very numerous both in R. B. and in Comm. These causes may be either intrinsic or extrinsic; i.e. the exceptionable thing, mistake, defect &c. may either appear on the face of the writ, or it may be extrinsic, - and not appear.

I. Misnomer and want of addition are grounds for pleading in abatement. And 1st as to the Defect.

Misnomer as to a defect, is cause of ab. & this whether the mistake is in the writ or not. A misnomer is a misnaming of the party or giving him a wrong name. 3 Bac 624. Salk 22. 2 B. & P. 502. 1 Sid 247. 6 Mod 105. 3 B. & P. 617.

Pleas and pleadings.

To plead is the omission of the Defs. addition a cause of abatement. The addition of a party is a description given of him in addition to his name to identify him more clearly. This additional description is called his addition. It consists in his title, trade, state, office, profession, degree, place of abode. Thus if an action is brought ag. A.B. It is not en^{ough} to call him A.B. His addition must be given him. If he is a Knight or Esquire, he must be so described. His trade also must be given him, as Merchant, Tailor &c. These are required by the Eng. Stat. 1 Hen V. called the Stat. of "Additions", for the sake of obtaining more certainty. The Com. Law did not require use these additions. 3 Bac. 617. Cases 106. Cro. 637. 6 Mod. 105. Carth. 14.

This Stat. only relates to personal actions, appeals, and indictments, and not to real actions. They continue to be governed by the rules of et. Com. Law. The reason of this is, in actions real, as the action is brought vs the party in possession of the subject in dispute, his possession was supposed, to identify him sufficiently. 3 Bac 618. 6 Mod. 85.

And as the want of addition is pleadable in abatement, so is a mistake in giving him his addition pleadable in abatement. As if a Knight is called an Esquire it is pleadable in abatement. The uncertainty by this is made greater. 3 Bl. 302. L. Ray 1014. 1 Com. 29.

In Com. the only necessary addition in common cases, is the Defend's place of abode. But where ^{he is sued} in his official or civil capacity, where the official capacity is inducement to the action, that is necessary to

Pleas and pleadings.

be added here as well as in P. g. This however is not to describe the person; it is only to show the character in which he is sued. This is not then properly an addition contemplated by the Stat. So if an heir is sued for a Bond due by his ancestor, he must be described as such, as heir, for he is only liable as heir. So if one is sued as Exec. or Adm. he must be described as such; So if a Sheriff is sued as such, he must be described as Sh. g. This is also the case as to all other officers, liable in their official capacity. 4 Bac 392 Vent 84. Coart 301. 2.

But where an addition by way of inducement is unnecessary, it is mere surplusage, and therefore a mistake does not vitiate it. The maxim is, "utile per inutile non vitiatur". Ex. gr. A is sued for a trespass committed by himself & is declared as heir of T. S. This description is negative & useless, and therefore if he is not the heir of T. S. it can do no harm. Bro E 333. or 333. 2 Bac 621.

The misnomer or want of addition in one of two defendants is not pleadable by the other. Advantage can be taken of it only by him who is misnamed, or whose addition is not set out, because the person who is misnamed may waive it if he chooses, & the other defendant can make no complaint. 2 Bac 526. Lutw. 36. 4 Bac 38.

And the rule is the same in criminal cases, where two are regularly indicted. 2 Hal. 177.

A question of this kind has been raised. If one of two Defs is misnamed & he pleads it in abate, does the writ abate in toto or only as to the person misnamed? This question has not been settled. In the discussions to be found in the Books, no mention is made of a con-

Pleas and pleadings.

consideration, which appears to me to be the correct
view. It is this. If the cause of action is joint, and
joint, only it must abate in toto. If it is joint, and
several it need not abate only, as to the person misna-
med. Leath 26. 8 Co 154. 3 Bac 625. 1 Com. 79. 4 Bac 45.

When a Defend. pleads a misnomer or want of id-
entification, and in general he who pleads in abatement
at all, must (as the expression is) give the plff. a better
writ. He must point out what the writ ought to con-
tain; he must show a mistake & how that mistake
is to be rectified. There is no such thing as this in plea-
ding to the action. Thus if one is sued by the name of
J. D. he must plead more than that his name is not
J. D. he must plead his true name. This is required
of him as a condition. So if he is described as an Englin
he must show his title, that the plff. may know by what
title to sue him. So if one of two joint Defs. is not sued
he must not only state that he and another person are
liable jointly, but he must state, who that person is.
French 263. 8 T. R. 515. 11 W. 2. 534. 2 Anst 34. 103. 4. 5 Ray 1178.

And he must go farther. He must not only
plead that his name is T. A. not J. D. but he must tra-
averse that he was ^{known &} called by the name by which he
is sued at the time of issuing the writ; because a person
sometimes has two names. It is not indispensable
that he should be sued by his baptismal name, for
if he had another name & was called by it at the time
of the writ, he may be sued by it. And it is not suf-
ficient that he aver that he is called by such a name.

Pleas and Pleadings.

but that he was called by such a name at the time of the
debt's issuing. Willis 524 Lewis 39. 103. Salk 6. 7. 1 P. Ray 118.
249. 4 Mod 447. 3 Bac 624. - Skinner 629

And if according to the rules of verbal criticism
the Deft. admits in his plea that he is the person named
his plea will be bad. If this is done by implication
"as the said A. B. &c." it is bad. Yet he must admit him-
self to be the person sued. Lewis 92. 57. R. 487. -

Advantage is to be taken of a misnomer, by a plea,
in abatement only. If it works a variance it may be taken ad-
vantage of in some other way. But this would not be a mis-
nomer in itself. If he omits to plead in abatement he waives
the misnomer, for a misnomer is no ground of error. 1 Bull.
780. Leath. 124. Salk 2. 3 Bac 623. 4. - 6 S. R. 766. Dun. in 3. Bac 616

And it is said if one executes a specialty by a wrong
name, he must be sued by his wrong name, and execution
must issue under the same name, and the right name
can come in under an alias. This does not seem to me
to be the proper mode of pleading. The only proper way
is to sue him by his right name and aver that he exe-
cuted the instrument by another name. This averment
is necessary to prevent a variance. - 12 A. 1018. 3. Bac 617.
1 Bull 246. 3 Bac 614. Dyer 273. Dun. in 3. Bac 616.

And the writ should always describe all the Defts.
by their proper names, except in the case of corporations
aggregate. And all who are jointly liable ought to be
sued, & that by their respective proper names. The ar-
bitrary name of a firm is not sufficient. Now in an ac-
tion on a firm, you must describe all the persons composing that
firm. 8 S. R. 508. - Prichard v. Brown & Co. 240

Pleas and pleadings.

This is not true of corporations. It is true only of natural persons. Corporations must be sued by their corporate name. A corporation is a legal ideal entity; if all the members of a corporation are named, it is bad. Leach 244. 1130. in "Corporations."

Formerly it was thought that if the mistake was in the christian name, it was fatal, but if in the surname it was not. This grave distinction has not obtained in Com., and it is not would not now be considered as Law in G. Britain. - 1 East 556 43. 1218. 1011 554 3 East 111.

Where a Defc. is misnamed, he need not for his own security take advantage of it, for if he is afterwards sued by his right name for the same cause, he may plead the former judgment in Bar and aver that he is the same person sued in the former action & that the suit is for the same thing. 1218. 4 Bac 38. 30 625. 87. 10. 508.

Misnomer of plff. This may be pleaded in abatement. This is a rule of the Com. Law. 1 Com. 14. 15. 3 Bac 617. 1 East 544.

The want of, or mistake in addition is not in most cases a defect at Com. Law. -

A replication by the plff. that the Defc. was as well known by the name by which he is sued, as by the other name, and such a replication is good; and if it is true or answered to the Plff. will recover. 1 East 542.

But every addition in the plff. is not pleadable in abatement, except at Com. Law. At Com. Law if the degree was as high as that of a knight he must have had this addition; otherwise not. The place of abode must I think be inserted. It is supposed rightly
(See Supplement Note C.)

Pleas and pleadings.

that there is no great danger of the pleff. being mis-
taken. At any rate the case of the pleff. is not within the
Stat. Hen V. 1 Com. 15. 6 Mod 85. 3 Bac 617. 618. 2 Rolle 469.

At Com. Law a misnomer was not pleadable to
an indictment for felony; as the person of the crim in
al standing at the Bar with his uplifted hands, was
made sufficiently certain. 1 Hawk 243. 2 Do 186. 238. 176. 4 Bac 38. 1 Sim 40

This is now altered by Stat. Hen V. because it reaches
to indictments. Cro. C. 104. 1 Sid 48. 2 Hawk 186.

In Com. the right name must be inserted, altho
we have not adopted the rule introduced by the Stat Hen V.
in personal actions. This however can do no good, because
he is in the custody of the Ct. & they will not discharge him
but keep him in custody until another indictment is
drawn.

As to petty offences where the Defend. can appear by at-
torney, it w^d be of use to plead a misnomer. Section IX.

III. Coverture. Another cause of Abat. is the cov-
erture of the Defend. The general rule is, that a feme cov-
ert cannot sue alone, and when she may sue alone, she
is considered as a feme sole tho' her husband be actual-
ly living. 1 Inst 132. 4 Bac 39. 1 Vin 140. When she alone she may plead what

But if a feme sole being sued, marries pendant
lite, the suit does not abate on this account; because
it would be to defeat the suit by her own act. The suit
is rightly commenced, the right of the pleff has attached,
& she shall not be able to defeat it by her own act. 10 Bac.
9. 10. Cro. J. 323. Stra 87. or 811. 2 Pe Ray 1525. Esp. 196. 328.

If a feme covert when sued, would take advantage

Pleas and pleadings.

of her coverture, she can do it only by plea in Abat. It cannot be taken advantage of by her plea to the action. If she does not plead in abat., she waives her objection. Latch 24. Luten. 23. 4178. 4 Bac 29. 39.

But tho a married woman, when sued alone does not plead it abat. & therefore cannot herself take advantage of the defence afterwards, yet her husband may come in & plead her coverture in Bar in any stage of the proceedings; and if he does not do this & judge. is rendered v. her, he together with his wife may reverse it on a writ of Error. The reason of this is, the wife cannot destroy the right of the husb. by her own act. of course her waiver of the coverture does not affect his rights so that he cannot take advantage of them. 3 T. R. 631. 5 B. 681. Latch 400. 5 Coupl 193. 4 Bac¹⁰ 29. 39. Latch 24.

This writ of Error is founded upon an error in fact. It does not appear on the record, for there is supposed to be no plea of coverture. This is a writ of error *coram vobis*, i.e. before the same Ct. wh. tried the action.

The husb. wife must both join in this writ of error, that it may be known that she is really a form covert, & covert of the husband claiming a reversal of the judgment. Ex R 16 or 19.

And it is a good cause of Abatement. that two persons suing, or two Defendants being sued as husband and wife, are not in fact husb. & wife. Thus if an action is brought v. A. and B. husb. & wife, it is pleadable in abat. that they are not married. Lewis 105.

But it is no cause of abat. that the Def. is an

Pleas and pleadings.

Infant & that his Guardian is not summoned to appear and defend. The regular course in Eng. in such a case is to appoint a Guardian, ^{ad litem} ad litem, 5 Co. 53. 1 Inst. 89 note 135. 3 Bac. 149. 3 Bla. 427.

In Con. where the infant has a Guardian appointed by Law, or a Father who is his natural guardian, he is regularly to be summoned to appear & defend. Another course is to give the p^lff time to summon or ch^g Guardian. If the infant has none, the Ct. will appoint one "ad litem" as the Cts. ordinarily do in Eng. -

To the p^lff upon request may have him summoned in, as p^ldyt. would be erroneous if recovered against the infant solely, or with^o notice to the Guardian? -

That an "Heir" who is sued on the deed of his ancestor or is an infant, is no cause of abatement; nor is it any defence to the action. When he is sued on his own contracts, he may generally defeat them by the plea of infancy. But here he is sued on the contract of his ancestor. In this case the rule of the Com. Law is that the "parol shall deliver," that is, proceedings shall be stayed until he attains full age. 4 East 485. Lawes 105. -

And in Con. we have a Guardianship unknown to the Law of Eng. - Under our Stat. Law the Selectmen of the Town under some circumstances, and the County Court under others, may appoint, in one case, oversers, in the others conservators to certain persons, who are not able to take care of their property; who thus become guardians, & during the time of their conservatorship, the person is not liable to be sued alone. But here if he is not

Pleas and Pleadings.

joined it is no cause of abat. in the first instance, for the Ct. as in the former case will grant time to summon him to appear & defend. Kirby 174.

IIII. Another cause of abat. is the death of parties. At Com. Law if a sole p^{ty}. or sole d^{ft}. dies pending the suit, it ipso facto abates. There was no rule established for continuing it after this time. 1 Com. 5. 6. 1 Inst 139. 4 Bac. 40. 41. 10 Co. 134. Cro. 2. 982. 1 Bac. 7.

And if one of several p^{ties} dies, except in personal actions after summons & severance, the suit abates.

A summons and severance is where one of two persons having a joint right refuses to join in the suit, for its recovery. In such case the other may sue in the name of both & summon him to appear; and if he does not appear the Ct. will sever them, and enter it on the back of the record, when the party prosecuting may proceed as tho he were alone.

But if in a personal action there had been a summons & a severance & the person severed dies, his death did not affect the suit.

In real actions, there was no exception. The reason for this difference between personal & real actions in this particular, cannot be easily understood. It is this - that by the death of one in a real action, the extent of the survivor's right is increased. So it is in personal actions. There is a technical reason, but it would take too much time to enter into an explanation of it in this place. - 10 Co. 134. 6 D. 26. 1 Bac. 7. 2. Ray. 463.

Pleas and pleadings.

But it was a general rule even at Com. Law, that if one of two Defendants dies, pending the suit, it should not abate. But in such cases the Plff. was to make an entry of the deceased Defendant, & proceed against the survivor. 1 Bac. 8. 1 Show. 186. 3. Mod. 249. Searle. 151.

If however in such a case as this, the Plff. should take judgment against both the deceased & the survivor the judgment would be void in toto. These were the rules at Com. Law. Coath 149.

But now by the Stat. 17 Car 2. and 8, and 9. William 3. in Eng. and in Com. by a similar Stat. the inconvenience by the death of parties is in a great measure remedied. Under the Stat. if one of two plts. dies, pending the suit, the suit does not abate, if the cause of action is such as would survive in favor of the survivor. As in the case of two joint obligors, or where the joint rights of two or more are violated.

So on the other hand, when one of several Defendants dies, pending the suit, the suit does not abate, if the cause of action be such as would survive wth the survivor. In either of these cases if the death of the deceased party is suggested on the record, the suit will proceed. This must be done, else judgment will go agt. all, & it will be erroneous. 4 Bac. 4. 2. 2. Show 115. Stat. Com. 22. 3. 1 Com 545. 6. 11. 11.

And under these Stat. if a sole Plff. or a sole Def. dies, pending the suit, it does not abate, if the cause of action be such as will survive to or against the personal representatives of the deceased. This rule does not

Placens, pleadings.

obtain in Eng. unless the death of the party happen after some interlocutory judgment obtained. 4 Bac 4th.

In Conn. it makes no difference. The rule prevails in every stage of the suit, tho no judgt. has been obtained. Stat 22.

The reason of the rule as it is in Eng. I suppose to be, that any interlocutory judgt. supposes both parties to have appeared.

In these last cases viz, where a sole p^{ty} or sole Defnd. dies if the p^{ty} dies the Exec^r or adm^r may inter p^{ro}se: enter the suit, by suggesting the death of the p^{ty} on the record.

If a sole Defnd. dies, the p^{ty} must do something more than suggest the death of the Defnd. on the record; he must have a scire facias vs the Exec^r or adm^r to show cause why judgment should not go v him. This difference is perfectly proper & reasonable.

It is to be observed however, that our Stat. relates only to suits in the Sup^r Ct. & Ct. of Comm. &c. &c. Therefore before a single magistrate the rule of the Com Law must prevail.

But there are ^{any} supposable cases, for which these Statutes do not in terms provide. Suppose two p^{ty}s die at different times pending the suit. What is to be done with this suit? In my opinion in the first instance it survives to the survivor, in the second place it survives, & then to his Executor.

If these two Defendants die, at different times, pending the suit, the same course must be pursued. It survives in the first instance, & ans^r. the survivor Defendant and then to his Exec^r or adm^r. This can only be true, where

Pleas and pleadings.

the cause of action survives in favor of, or against, the survivor. -

In these cases the Exec. of the last surviving p^{ty} is accountable to the Exec^s of the other p^{ty} for their share of what he recovers. And the Exec^s of the Defend. are liable to the Exec. of the last surviving Defend. for their proportionate share of the burden, which has been recovered against him. -

Real actions abate in most cases upon the death of a sole p^{ty} or sole Defend. They remain as at Com. Law because the Stat. does not affect real rights. The Stat. speaks of actions surviving against personal representatives, not of the heir, remainderman, or reversioner. It relates only to personal actions. -

But real actions where there are several p^{ties} or several Defends. are within the Stat. Here it does not mention personal representatives, but the surviving original party. Here the action will not abate by the death of one, if the cause of action be such as would survive in favor of the surviving p^{ty} in the one case, & agt. the surviving Defe. in the other. 1 Bac. 7. Cro. E. 892. 1 Inst. 177.

It was decided in the year 1800. by the Supreme Court that petitions for new trials are within our Stat. tho' the Stat. makes use of the expression "all actions" This principle was affirmed by the Sup. Ct. of Errors June 1803. and yet the Stat. was made long before new trials were known by our Law. But the decision says all Courts, & is now to be observed. The case was Moore, et al. vs. The Bank &c. Reported in D. & B. R.

Pleas and Pleadings.

IV. Variance. Another cause of Abatement is variance.

In the first place if the declaration varies from the writ it may be pleaded in abatement. It is said that here the declaration itself abates the writ. *Felt. 5. 1 H. Bl. 249. 4 Bac. 3. 4. 4.*

And it is said especially in the 3d book, that where the variance is in form only, no advantage can be taken of it only in abatement. But if the variance is in substance, this plea, tho' it may be made, is unnecessary, for judgment may be arrested after verdict, or the Court in officio ought to dismiss it. *Bro. 2. 121. 155. 108. 722. Felt. 120. Hol. 279. Latch. 75.*

In *Willsons* reports however, the Chief Justice intimates that the latter branch of the rule is not the practice, for the variance, he says, must always be pleaded in abatement. And his opinion seems to be supported by others. *2 Will. 394. 4 Mod. 246. Latch 658. 701*

A variance in point of form, consists of such mistakes as those of giving the Defendant a different name, a addition of in the declaration from that in the writ. Variance in point of substance, consists in giving the Def. a different title, quantity of interest &c. in the Dec. from that in the writ.

Again, a variance between the instrument sued on, & the description of the instrument in the writ is good cause of abatement. Thus if the writ states a bond for 100 L. & it is found to be a bond for 50 L. it is a variance pleadable in abatement. These variances, as

Pleas and pleadings.

you perceive are numerous. If there is a misdescription it is a variance. *Flow?* 84. 6 Co 121. 2 Wils. 282. *Lauris* 106. 4 T. Rep. 314. 612. 1 Bos & Pul. 67. 1 T. Rep. 656. *Dono* 640. *Com. Abat.* 2. 17.

But if the variance is between the instrument on which the action is founded & the description of it in the declaration the usual mode of taking advantage of it, is by pleading the tenor of issue, & objecting to its being given in evidence to the Jury & thus working a nonsuit. 10 T. R. 656. *Dono* 640. 1 Bos & Pul. 7. *Comp* 766. 7. 1 *Sand* 154 *note* 4 *St. 10*. 612. 687. 8.

In *Conn.* on the other hand a advantage is taken of it by plea in abatement, usually. This altho it is not necessary may be done. It may be taken advantage of, here, in the same manner that it is in England. *Salk* 654.

It is said by *Cornys* & I presume it is Law, that this may be taken advantage of in England by plea in abatement. - 1 *Corn.* 44. - *Doctrina Placitorum* 1.

With regard to this kind of variance, advantage may be taken of it in either of four different ways. 1st By plea in abatement; 2nd By objecting to its being given in evidence under the tenor issue; 3rd By praying oyer of the instrument, placing it on the record and then answering to it. † *Lauris* 51. 99.

But the Declaration cannot be answered to after putting the variance upon the record after oyer, since all the objections which can be made to this, must be made to the Dec. itself particularly what originally appears upon it. But the Declaration is good before any oyer & this cannot vitiate that. 1 *Lauris* 154 *note* 317. *R. A. T.* 313. *Dono* 208. 213. 2 *Pla.* 1146. 2 *Wils.* 339. *Kirby* 106. 7. *Robt. M. Law* 51. 19.

2d ed. 18. giving it in evidence under the tenor issue.

† See Supplement p. 1.

Pleas in abatement.

Misnomer or such must be pleaded in abatement. But if in a written instrument, misnomer occurs a variance, it may be taken advantage of as a ^{variance} ~~misnomer~~, but it is then not treated as a misnomer. It is treated as a variance. 2 C. Rep. 612. 1 S. Rep. 656. Lecture X.

V. Another cause of abatement is the nonjoinder or misjoinder of parties. Under a former division of this subject I considered what things might, & what might not be joined in one declaration, & also what parties might or might not be joined in one writ. I am now to consider the ways in which advantage is to be taken of these defects.

It is a general rule that if one person sues alone where several ought to be joined with him, the nonjoinder is always pleadable in abatement. I am now speaking of the nonjoinder & misjoinder of necessary plaintiffs. 1 Anst. 164. 189. 195. 198. 2 Salk. 41. 1 Saund. 291. 1 Com. 10. 11. 7 T. R. 243.

This general rule extends to all cases of torts, as well as to contracts; in fact to all actions whether real, personal or mixed. Thus if one of two joint tenants bring an action for an injury to their joint tenancy, the omission of the other is pleadable in abatement. So the rule is the same where one of two joint obligors, promisors, covenantors &c. & sometimes in the case of tenants in common. Cro. Eliz. 143. 2 Hob. 22. 1 Com. 12. 1 Roll. 294. 2 Hob. 72. 1 Leon. 315.

As therefore ~~in the case of~~ ~~the parties~~, where there is a nonjoinder the mistake is pleadable in abatement, so on the other hand if several sue where the right of action is in one only, this misjoinder is pleadable in abatement.

It has some pleadings.

If A executes a note to B. and B and C. bring an action upon it, A may plead in abate. to it. Hoob. 72. 1 Leon. 315. 1 Com. 13.

This rule then you see is general and extends to all cases viz. that the mistake may be pleaded, in abatement.

But further. If in an action on contract ~~with~~ one sued alone when several right to join it may be taken advantage of under the gen. issue as well as under a plea of abatement.

On the other hand if two or more sue on a contract where the right of action is in one only, advantage may be taken of it in the same way. He may plead in abatement, because there is a wrong joinder or misjoinder, and he may take advantage of it under the gen. issue because the contract sued upon is not the contract entered into. The evidence does not support the declaration, as when J. S. makes a contract with A. only; A. and C. bring an action on this contract agt. J. S. The averment that J. S. made the contract with them both is not supported, & therefore advantage may be taken of it under the gen. issue. 2 Stra 520. 1 B & P. 75. 2 J. K. 282. B. N. P. 152.

The Defend. may also in this case (viz. contracts) take advantage of the non or misjoinder in another way. He may pray copy of the contract, when it is a written one, place it on the record then deliver to it. This is only true of written contracts for you cannot pray copy of a verbal contract. This can be taken advantage of only in the two ways before mentioned. 1 Bos. & P. 57. 75 1 Sand. 153. 2 J. K. 282. 2 J. K. 282.

And if in an action on contract one sued who

Pleas and pleadings.

another ought to be joined & that appears upon the face of the declaration (when he could be joined) the mistake is a fatal one, & is not aided even by a verdict. 5 Co 18. 2 Stra. 1146. Salk 32. Rep. Di 304. 11 Mod. 67. 1 Sand 153. 291 f.

(But in Tort it is otherwise. The mistake is not radical. Salk 32. D. T. 16. 755.

The reason of the difference in the two cases is this. In the case of contracts there is no cause of action appearing on the face of the declaration. In the case of tort after verdict, as it appears one has done the wrong it makes no difference whether any one has assisted him or not, or whether the right violated was joint or not.

And in actions founded on Tort, if one sues alone when others ought to join, the mistake must always be pleaded in abatement, & no advantage can be taken of it under the Gen. issue. This is the general rule. Salk 290. 1 Lea. 820. 320. 1146. 2 Sand 291. f. 29. 6 T. R. 766. 5 D. 649. Rep. Di 143.

But if two sue in tort where the right of action is in one only, advantage may be taken of it under the gen. issue. 5 Bac 200. 6 T. R. 143. No advantage of the non joinder can be taken under the Gen. issue, 'because the party has an interest'. The Defend. has done a wrong. But in the latter case where the defect is in the misjoinder, advantage may be thus taken of it, because he in whom the right of action is imbrakes his rights with a stranger who he cannot communicate. The objection then here goes directly to the merits of the case. The Defend. may truly say "I am not guilty" I am not bound to answer to a stranger. 5 Bac 200. 6 T. R. 143.

Pleas and pleadings.

The last rule (where there has been a misjoinder) has been decided to be Law in our Sup. Ct. in *Fairfax v. D.D.* 1805.

And if one part owner of a personal chattel, sues alone for a tort and no plea in abatement is given in, and by the defect is waived, so that judge. you say. the Def^r. the other part owner may afterwards sue alone for his part of the damage sustained. 7 T. R. 729. 1 Esp. R. 116. 2 D. 586. 622.

Thus far of the non joinder & misjoinder of plaintiffs; as to the non joinder or misjoinder of Defendants, some distinctions are to be observed. If one of two persons ^{jointly} liable on contract is sued alone, the non joinder must be pleaded in abatement or it is waived. In the case of p^{ers}. you have seen the rule to be otherwise, for there advantage may be taken of the defect by the General issue. There is an exception however to this rule, for if it appears from the face of the declaration, or any other pleading on the part of the p^{lff}. that another person ought to be joined, the mistake is fatal to the declaration & cannot be cured even by verdict. 5 Bar 2611. lead gear. 2 D. R. 947. 5 T. R. 651. 6 D. 327. 369. Com 832. 176. 136. 236. 1 Saus. 291. 5 Co 119.

Formerly this rule (viz. that abat. must be pleaded) was otherwise. It might have been taken advantage of upon the general issue. If you consult all the authorities, both ancient & modern you will find it difficult to reconcile them all. The modern Authorities however have completely settled the point. Salk 440.

Suppose then A. & B. execute a joint bond & A. alone is sued, he must plead the non joinder in abatement; for if he pleads the general issue, he pleads that it is not his act & deed; but it is his act & deed, tho it is not his sole

Pleas and pleadings.

act & deed. So in the case of joint promises, the one would plead that he did not assent & promise, but he did as sure & promise, tho not solely. The reason of this rule as applicable to parole contracts is obvious. There are frequently dormant partners in a house, but if the active partner only is sued on the contract, in his plea of abatement he must discover all the partners. But if he could plead the nonissue he would be obliged to discover no more than one partner to avoid the suit, which would be subjecting the plff. to great inconvenience.

And in these cases where one is sued alone, when others ought to join, if another action is brought and a new Defend is joined, he may plead that there is another who ought to be joined. The man who is first sued, can never plead again that there is another who ought to be joined. It belongs only to every new Defend. and. 3 East 701.

But if it appears upon the declaration or any other pleading of the plff. that ~~any~~^{an} other person was jointly bound with the Defend. & that person is amenable, (as if he is described as in being) the nonjoinder is an incurable defect & judgment may be arrested after a verdict for the plff. If this does not appear advantage can be taken of it only by plea in abate. as was seen before. 5 Bar. 2614. 1 Vent 342. 1 Lawd 291. 606. 6 T.R. 749.

With regard to Defend's or actions sounding in torts, there can be no objection taken either by plea in abatement or otherwise. For all torts are in their nature joint & several. The act of one is the act of every

Pleas and pleadings.

other. Therefore one or all may be sued. Consequently it never can be objected to an action sounding in tort that the Defend. & another is jointly liable. There is no joinder about a tort. 8 Co 159. Plow 429. 10 Purr 291. 5 Bosc 142.

And on the other hand if one commits a tort alone & others are joined with him he cannot object to it, because the others may show themselves innocent if they can. But in contracts all or none are liable. A recovery must be had on that as stated or not at all.

There seems to be an exception to the last rule, when the action concerns the real property of the Defend. It is said by Lord Kenyon, that where one of several persons, is sued in tort where the cause of action affects the real property of him and another, the action is not rightly brought. Thus A & B are owners of land & liable by tenure to repair a way; A is sued alone; he may plead that B ought to have been joined. 6 T. R. 651. 1 Purr. 291. 2 W. 182. Com. Dig. li. about. f 6.

Where the contract is joint & several, it has been observed that one or all might be sued; but that two of those persons jointly & severally bound could not be joined. With regard to taking advantage of this latter case, the rule is, the mistake must be pleaded in abatement. No advantage can be taken of it in any other way. 1 Purr. 291.

Thus far we have treated of nonjoinder of necessary Defendants.

On the other hand if two or more are sued on contract when one only is liable, advantage may be taken of it under the general issue. A and B make a

Pleas and pleadings.

joint promise, but the plff. brings his action on the promise agt. A. B. and C. - & never made the promise. The misjoinder may be taken advantage of under the general issue, because the evidence cannot support the Decl.ⁿ 1 East 47. In Com. this has been decided to be law in the case of *Phelps & Battle*.

And it seems that in such a case as this, if the Jury find a verdict agt. him who made the contract & in favor of him who did not make it, judgment may be arrested by him agt. whom the verdict is found, because the contract in the Declaration is negatived by the verdict. 3 East 62, *Carth* 381

These distinctions are extremely important in practice; hardly any branch of the title of Pleadings is more necessary to be understood.

VI. Another cause of abatement is the pendency of a prior suit for the same thing between the same parties. It is a legal maxim, that the Law abhors a multiplicity of suits; and this rule is made to prevent the plff. from harrassing the Defend. with suits. No man having commenced one suit, well adapted to his case on one cause of action can commence another for the same cause agt. the same person; & if he does the pendency of the former is pleadable in abatement to the latter. 1 Bac 124^o 48.

This rule (as it plainly implies) applies only where the suits are of the same kind, or at least concurrent, or the cause of action the same in both. It is not necessary that they should always be of the same kind, for many actions are concurrent, which are not of the

Pleas (and pleadings) -

same kind as Trespas & trover frequently. - 5 Co 61 a and b.
Hob. 184. 4 Co 42 a.

But tho two suits are pending between the same parties & tho the cause of action arises from the same transaction, i.e. out of the same facts, yet if the thing for which the action is brought is not the same, the one is not pleadable in abatement of the other. As in the case of a Mortgage, where ejectment, action on the bond or bill filed in Chancery to foreclose may all be bro't. one will not abate the others because the objects of them are all different tho they all arise out of the same transaction. 1 Com. 49. Mass. 18. 539.

And the plea (viz. the pendency of one suit for the same cause of action) is good, tho the suit is pending before another Court.

In Eng. there is an exception to this rule, where the former action is in an inferior Court, because a Superior Court may remove every action from an inferior, by writ of Certiorari. 5 Co 62. 4 Bac 48. 2 Wils 87. 1 Com 49.

Under the Laws of Con. there is very little application of this rule, for there are very few cases where the Courts have concurrent jurisdictions.

And for the purpose of defeating the latter suit, it is not necessary that the former suit be pending at the time of pleading in abatement to the second. It is sufficient if it is pending at the time of commencing the second. The second is always, in this case, where commenced during the pendency, considered ab initio void. Doctrine Placitarsi 10. 1 Bac 10. 4 Bac. 47.

Pleas and pleadings.

Upon the subject of this plea there has been a series of decisions in Conn. perfectly consonant to principle tho there are no precedents in the English Books.

It has been decided that if the first suit is wholly inefficual the pendency of it shall not abate the second, for it cannot be vexatious. Thus when property attached by the first process is found not to be the property of the Defend. the plff during the pendency of this may sue him on another attachment. The pendency of the former will not abate the latter. Or suppose the property attached be found to be of no manner of value, the rule is the same. So if the first action is clearly misconceived & not adapted to the case, the plff. may bring a second during the pendency of the first action. Indeed the English rule requires that the actions should be concurrent. Thus suppose an action agt. a bailor & the plff. sh. sue in Trespas when trover only would lie, if the plff. bring trover during the pendency of the action of Trespas, his suit will not be abated. 1 Root 365. 562.

Indeed the very object of the rule is to prevent vexation. But in the case above there is no vexation, therefore I conceive where the ~~second~~ second is not vexatious the pendency of the first will not abate it.

The pendency of one action of Book debt in Conn. does not prevent the Defend. from suing the plff. during the time on book, for there may be cross suits between the plff. & Defend. on Book. Each may challenge a balance indeed in the original action, the Defend. may recover if he is entitled to a balance. But our Stat. precludes

Pleas and pleadings.

the Defend. from costs if he neglects to present his books for a valuation to be made on the first suit, unless he has very good reasons. Stat. 136. 1 Root 155.

The plea of a pendency of a former suit is good for the same cause, altho in the second suit a new Defend. should be added. The better opinion seems to be, that the suit will abate as to all the parties in the second suit. Thus if A. brings an action R. A. & before this is disposed of brings a second for the same cause agt. A. and T. the first may be pleaded in abatement of the second. 4 Bac. 40. 9. Hob. 137. 96. 7. 127. Carth 96. 7. 1 Bac 13. 14. (Lutw. 42. 1 Show 71. contra.)

On the other hand, tho of one of the Defts. in the first action ~~is~~ omitted in the second, the pendency of the first is pleadable in abatement to the second; and here the last must abate entirely without doubt. You will however remember if the first action should be misconceived the pendency of the former is not pleadable in abatement of the latter. This follows from the rules before given. 1 Bac. 13. 14. Hob. 137. Carth 195. p. m.

To prevent the rule from operating unjustly on the p^{ty}, it is settled that if the second action is commenced on the same day the first is abated, the second shall be presumed to have commenced after the abatement of the first so that the pendency of the first is not pleadable in abatement of the second. The law allows no fraction of a day for this purpose. This is a presumption of law not to be rebutted. 4 Bac 49. 13. 14. Allyn 84. Foll. C. 2. p. 40.

But it is no cause of abatement that another action for the same cause is pending agt. a stranger. The Deft.

Pleas and pleadings.

has nothing to do with the pendency of this suit. Lea.
420. Hob. 137. 8.

And it is no ground of abatement in criminal cases that another offence indictment is pending agt. the Defend. for the same offence. Courts of criminal jurisdiction have a kind of discretionary control over indictments. They will quash the one or the other as they think proper. 2 Hob. 190. 275. 387. 11 Bar 13.

But in the case of informations filed by the Atty. General, ex officio or presented by some informer, the Court has no such discretionary power. The general rules with regard to civil actions apply in this case. 1 Bac 13. su. 8. p. 1.

But if two informations are exhibited by different informers against the same individual, for the same offence, on the same day each will abate the other, & neither can proceed. Neither of these parties can claim any justice for himself. An informer is a mere volunteer & is entitled to no indulgence. The day is a punctum stands & the Court will suffer no proof to be introduced to show that one was commenced before the other.

Hob. 128. Moore 864. 5. 1 Con 47. Hob. 864. 5. Section XI.

VII. The writ having unduly issued is another cause of abatement. And it may be laid down generally under this head, that any irregularity or informality in the writ is a ground of abatement. Lauds 104 or 105.

Thus if the writ is made returnable to any other than the next succeeding term of the Ct. to which it is made returnable, provided sufficient time has intervened between the date of the session for legal services.

Pleas and Pleadings.

This writ is not only abateable, but it is absolutely void, for if the writ was at liberty to pass over one Court, he might live & so on for 20 years. - The Defend. ought to have immediate relief, because, as the case might be, he might be taken to Bail for an indefinite length of time. Yet if there is not sufficient time for legal service, the writ may be made returnable to the next Court but one. 3 Wils. 341. Tulk. 200. 1 Root. 315. 6.

If the writ is not signed by proper authority, it is abateable. Yet this need not be pleaded, as it is in strictness void, & every person acting under it a trespasser.

And in Con. where our Statute law makes it necessary that the duty should be certified, where there is the want of this certificate of the payment of the duty, the writ is not ^{only} abateable & is void.

A want of date or an impossible date will abate the writ, as the 30th of February; and in Eng. the date cannot be amended. 1 Show. 80. 4 Bac. 43. Cro. E. 592. 1 Sid. 304. 1 Com. 40. 1 Sen. 21.

In Con our Sup. Ct. have given no decision on the subject of amending the date. But the Cj. Ct. allowed it to be amended in the case of Upadham in Pitchf. County.

A defective return is also cause of abatement, that is, if the writ is made returnable within the period limited for its return, or in other words if a shorter time intervenes between the time of service & the term than the law requires. Cro. E. 50. Tulk. 63. 1 Sid. 406. Suten. 25. 2 Hale. 411

In Eng. the time limited is 15 days before the Courts in Westminster Hall. - In Con. 12 days are allowed before Sup. & Cj. Courts; 14 in cases of foreign attachment, and 6 days before a single Magistrate.

Pleas and pleadings.

So also if the return of the officer, i.e. the service, is insufficient on the face of it, this in Eng. is a cause of abatement. But if the Sheriff's return is on the face of it sufficient, it cannot in Eng. be contradicted by a plea in abatement. The party is left in such case to an action vs. the Sheriff for a false return. 2 Stra 813, n 818. 1 Wils. 573.

But according to our practice in Con. if the service appears defective either on the face of it, or by any thing dehors the Defend. may plead in abatement to it. The indorsement may be contradicted for the purpose of abating the writ.

The omission of some requisites necessary by our Statute does not have the effect of abating the writ. Thus if the Sheriff omits to leave a copy of the writ with the Town Clerk as the Law requires when he attaches land, this cannot be pleaded in abatement. The object of the Statute is to give notice to third persons of the lien upon the land by the attachment, & the Defend. has no reason to complain if the Stat. is not followed in this respect. It is enough for him if he has had due notice. Stat. 33.

But if where property is attached by the Sheriff a copy is not left with the debtor, the writ will abate, provided there is not sufficient service in any other way, in which case it will not abate, as if the writ be read to him. The effect would then be only this, that the Sheriff would not obtain a lien upon the property. 1 Root 54. 128. 363. 2 Root 130. 346.

VIII. The want of a venue in the writ is a defect which is pleadable in abatement. The want of a venue in the declaration is cause of Demurrer.

Pleas and pleadings.

This word, venue, in Norman French signifies "neighbourhood"; and it is used in Law to denote the County, where the action is laid &c.

According to the strict theory of the ancient common law, every action must be brought in the County where the cause of action arose. In local actions the rule is, strictly adhered to, but in transitory actions we have seen it is waded by fiction. 5 Bac 332. 7 T.R. 243.

As in transitory actions the laying the venue is mere matter of form, it follows of course that if the venue is wrongly laid it is no cause of abatement; consequently it is not necessary to lay the venue as it really is in matter of fact. The Ct. on motion might be sure, in its discretion change the venue, tho it is seldom done. Yet a false venue in transitory actions is no cause of abatement. 2 Palk 449. ^{6b} Comf 510. 1 Bos & P 20. 245. 3 East 329. Sawers 74. Sid 44. 1 Com 44 or 47. 117. 118. -

But in local actions the venue being matter of substance, the laying of a wrong venue is a cause of abatement. As in Trespas quare Clausum fregit, an action bro't in the County of M. & the land described as lying in that County, it is good cause of abatement if the lands lie in the County of D. 1 Bac 34. 7 Cc 2. 3 Com 10. "abatement" h. 17.

The rules as to venues are not the same in Con. as in Eng. because the rules of pleading in this respect is different. In Con. in transitory actions it is not material even in theory where the cause of action arose, because under our Law the action is to be bro't in the County where the Plff. or Defend. lives (before Supreme or County Courts.)

Pleas and pleadings.

The residence of the plff. or Defend. determining the jurisdiction. If the action is before a single minister of the Law, the rule is, the action must be bro't in the Town where the plaintiff or Defendant lives. This is an analogy to the former rule. - Stat. 26.

Where the plff. is out of the State, the action must be bro't in the County where the Defend. lives. And if a plff. out of the State sues before a single minister of the Law, he must bring his action in the Town where the Defend. lives. If the writ then is defective in either of these particulars, it may be abated.

In land actions our rule is the same as that of the common law. The action must be brought in the County where the land lies; tho it is thought that the plea should go to the jurisdiction & not in abatement.

That the cause of action had not accrued at the commencement of the suit is another reason for abatement. This objection may also be taken by plea to the action. It may be pleaded in abatement, because there is a defect in the writ. It may be taken advantage of by plea to the action because it goes to the merits of the plff's claim. - 2 Lev. 197. 1 Con. 37. 105. Hob. 199. Sams 166.

And when this defect appears from the pleading advantage may be taken of it by rejoinder, or by a motion in arrest of judgment. 1 Co. 169. 30. Carth. 114. Cro. 325. 1 Plow. 147.

I have now gone through all the enumerated grounds of pleading in abatement.

Now then

Pleas and pleadings.

As to the mode of pleading in abatement, and the effect of such plea.

Plea in abatement regularly begins and concludes to the writ or the case may be, to the declarations, as in the Bill of Middlesex, where the writ & decla. are the same.

Its conclusion is by praying judgment of the writ, & that the same may be abated or quashed. In due the plea regularly begins and concludes in this manner. There is to be sure a distinction taken between the form of the plea for an intrinsic and one for an extrinsic defect. In the former case it is said both to begin & conclude in the manner above specified; in the latter case that it only concludes in this manner. This distinction however is not at all regarded in practice. 5 Mod 132. 5 Bla. 303. Laws 108. g. 162 — Gen. Stat. Abat. p. 12. —

The plea I say regularly concludes to the writ, but not always, for where the plea goes to the person of the party the plea concludes by praying judgment whether the Defend. ought to answer. Tidd 584. new Ed. Laws 109.

And where the writ is abated de facto, i.e. where it would be abated without plea, the plea concludes by praying judgment whether the Court will proceed further. Suppose then the writ is void & the Defend. pleads in abatement, he concludes praying & whether the Ct. will proceed further. Laws 109.

It is said in Lewis's Reports that the character of a plea is determined by its conclusion, without regard

Pleas and pleading.

to the matter of it or the manner of its commencement.
⁽¹⁾ This rule is the best, for upon the question what ought to decide the character of a plea in abatement, the rule ought always to be positive; and the simplest is best. The above is the simplest. Lucas 112. L. Ray? 694. 12. Mod 52 p. 4 Bac 50.

But according to Ld. Holt the character of a plea is determined by the beginning & conclusion of it taken together. This is undoubtedly true, for the other rule only looks to the conclusion to determine the character. Lucas 107. 145. 6. Ld. Ray? 593. vid 584. 591.

But Ld. Holt lays down some farther distinctions ^{but which are correct} rather arbitrary. He says if the matter of the plea would be good in Bar, still if it begins & concludes in abatement it is a plea in abatement. Or if the matter pleaded be only in abatement, yet if the plea begins & concludes in Bar, it shall be so considered. And so if it begins as a plea in abatement & concludes as a plea in bar, it is to be returned a plea in bar or a plea in abatement according to the matter of the plea & vice versa. Ld. Ray? 593. 1012. 4 Bac 49. 6 Mod 103. 4 Bac 50. Mont. 136. 3 Mod. 281.

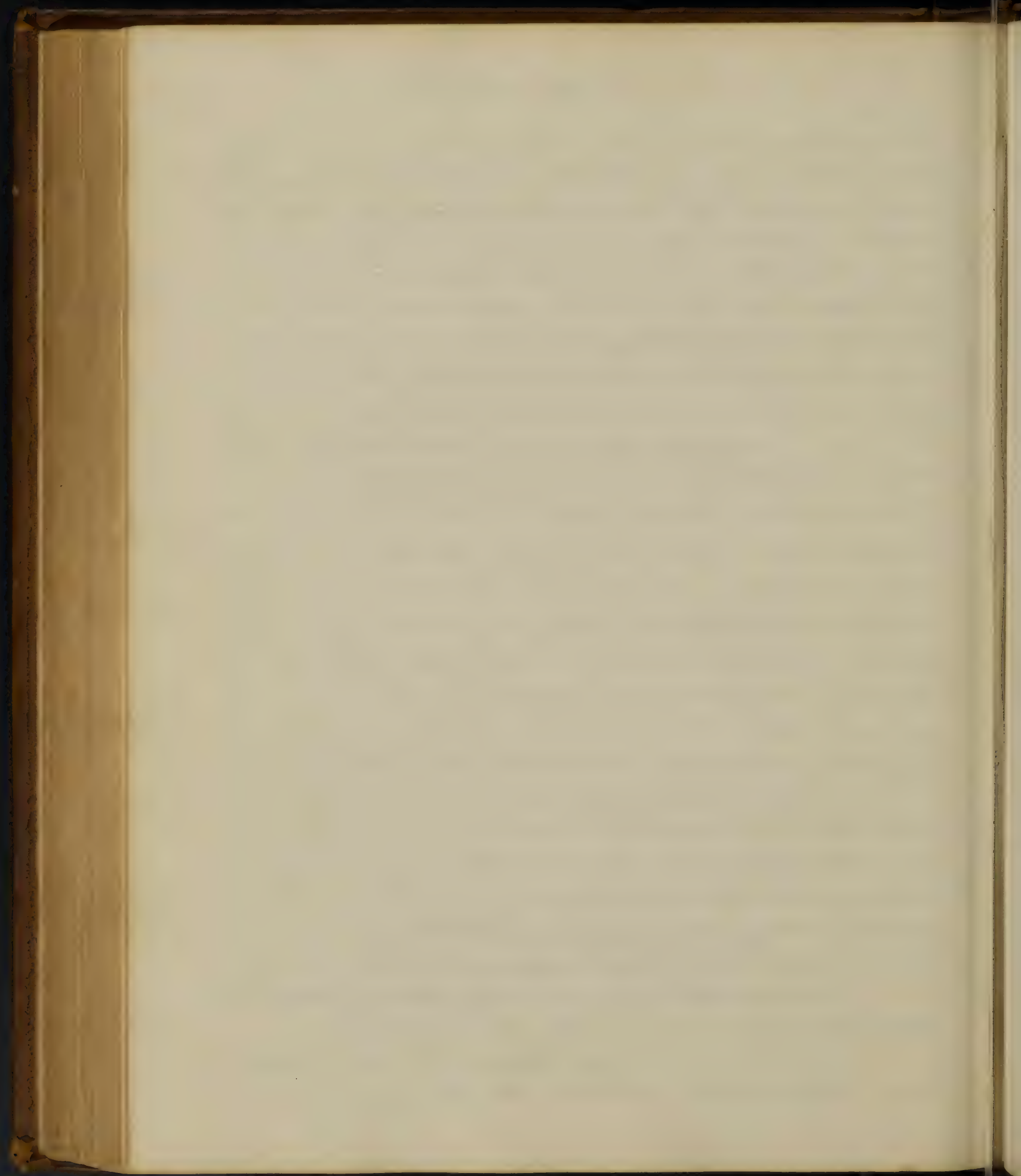
Further. He says if the matter pleaded go in bar or in abatement indifferently if it begins in Bar, & concludes in abatement or vice versa, the party may consider it as a plea in abatement or as a plea in Bar as he pleases, & answer it accordingly. The judgment you see would be different in the two cases. See chattel supra.

As to the forms of pleading in see, 3 Ld. Ray? 1153. 57. 72. 107. 116. Lucas Appendix

But a plea in abatement founded on matter (must be in abatement)

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Pleas and pleadings.

which goes only in bar is not good, & so non est a plea in bar founded on matter which goes only in abatement is bar. The offices of the two pleas are wholly distinct. 1 Inst. 128. p. 46. 12 Mod. 400. 1 Mod. 244. 1 Bac. 14. 86.

But when the matter pleaded will go either in bar or in abatement the party may plead^{it} either way. Thus, alienage in a real action may be pleaded in abatement or in bar. 1 Mod. 244. 4. Bac. 50.

It is said by Ed. Coke that duplicity is a fault in all pleas except dilatory pleas - but of these a man may use divers of them in their proper time & place; and from this it has been held, that a man may plead two pleas in abatement to the same cause, in the same part of the writ. That this is not the true rule, he cannot do it. True he may plead the several kinds of dilatory pleas in their proper order & this is the amount of the rule; thus he may plead to the jurisdiction, then the disability and then in abatement, but he cannot plead two of the same kind as two outlawries, two excommunications. Duplicity is as much a fault in a dilatory plea as in any other. Lawes 108. Hob. 252. 1 Inst. 304. 1 Bac. 15. Lamb. 8. 9. 1 Com. 65.

When a cause of abatement is pleaded & judgment is rendered upon it, error lies upon it, as well as upon a judgment in chief; but a writ of error will not lie until judgment in chief has been rendered, because the law will not allow a party to bring a writ of error where there may be perhaps no necessity for it, for he may succeed in a trial on the merits. But a more abatable defect is not

ground

Pleas and Pleadings.

ground of error unless it is pleaded. It is otherwise -
waived. 10 R. 766. Cro E. 544. Carth 124 3 Bac 151. Doc. Plea. Intro. 45.

This is the case as to mere matters of abatement.
But where there is an exception which may be taken in
abatement ~~going~~ to the cause of action, one which may
be taken advantage of in every stage of the proceedings,
then the objection is not waived by not pleading in abate-
ment & therefore a writ of error will lie tho there was
no plea in abatement. As in the case of Coverlure, if
not pleaded by the wife in abatement, it may be taken
advantage of by the Husband at any time & error will
lie if judgment be rendered against her in Chief. Sed. Ray?
594. Stiles 254. 4 Bac 39. 2 Roa R 53.

And upon the same principle of waiver, it is an
established rule that to a scire facias on a judgment,
the Defend. is not allowed to plead any thing ^{in Ar.} which he
could have pled on the former action. Palk 2. Cro E. 283.
575. Co Lit 303.

even as a Declaration may be good in part and
bad in part, so may a writ also remain good as to the
residue. Laws 106. 7. 2. Post Tul. 270. Lecture XII.

Judgment on a plea in Abatement.

As a plea in abatement does not regularly go to the merits
of the cause, a judgment upon it does not regularly go
in bar of a subsequent action for the same cause, - One
recovery by judgment by a seff. is pleadable in bar to a
subsequent action for the same cause. or judgment in
Chief in favor of a Defend. is a bar to another action v. s.
there for the same cause. This is founded on the idea

Pleas and pleadings.

that the merits of the cause have once been determined. This is the ground of the rule. But a judgment on a plea in abatement does not go to the merits of the cause. The real cause of the complaint is not regularly brought in question by a plea in abatement. 4 Bla. 290. 4 Co. 43. 4 Co. 46. 8 Co. 37. 48. on action L. 4

But I give this merely as a general rule, for there are cases where a judgment on a plea in abatement is on chief & goes to the merits of the cause. As alienage in a real action. This goes to the subject matter in dispute between the parties. Here a judgment on a plea in abatement may be pleaded in bar of a subsequent action for the same cause. vide supra.

The judgment on a plea in abatement when rendered in favor of the plea, that is of the defend, is that the writ be quashed or abated, and this puts an end to the suit. It is true under the Stat. of Leofails the plff. may often amend his writ. This I have nothing to do with at present. The suit revives when the writ is amended. But I am supposing a case where there is no amendment. 1 Vent. 222. 2 How. 42. 1 Sely. 112.

But where judgment is rendered for the plff. on a plea in abatement, it is different in the two cases of a judgment on demurrer to the plea & judgment on an issue or fact. 3 Bla. 303. 346. 2 Wils. 387. 1 East 542.

If the plea in abatement is overruled by demurrer the judgment is respondat ouster, let him (the defend.) answer over again. This is an interlocutory judgment preceding the final judgment. 3 Bla. 303. 2 Wils. 387. 1 East. 542

Pleas and pleadings.

But if judgment is for the p^lff. on an issue in fact formed by a plea in abatement, the judgment is a judgment in chief "quod recuperavit", let the p^lff. have judgment. The reason given is that as the D^f had obliged the p^lff. to answer to a plea which was false & incurred costs, the D^f shall not be allowed to plead again. The judgment is a sort of retaliation upon the Defendant. 10 R. 119. 4 Geo. 111. 2 Wils. 367. 1 B. & C. 15. 5 R. 594. 6 Geo. 2, 236.

But in trials for capital offences, this rule does not hold, as the criminal may have the privilege of answering over to the action, if his plea in abatement fails.

In Con. the rule is somewhat different from what it is in Eng. It is precisely the same when the D^f has judgment, & where the p^lff. has judgment, on a demurrer.

But where an issue in fact is closed by a plea in abatement, the distinction observed by our Court is this, If the issue in fact is closed to the jury, and judgment is rendered for p^lff. judgment is in chief; if it is closed to the Ct. & judgment is for the p^lff. the judgment is a responsive judgment.

Mr. Justice has laid down the general rule in Eng. but has not noted this distinction. 2 Jervis 204.

The rule in Con. seems to imply that such issues here may go to the jury. But Mr. Justice doubts it since we have a Statute requiring all pleas in abatement which are in the Cr. Cts. to be tried before a jury is unparalleled, which implies that our Legislature intended that these should always be tried by the Cts. The universal practice is in this State to try them by the Court.

Pleas and pleadings.

If that which goes merely in abatement is pleaded in Bar judgt. is in chief, for if the party well plead in bar, he must take the consequence of pleading to the action... L. Ray? 1020. 1 East. 634. 1 Lutw. 41. 1 Chitt. 445.

And the plff. may if he chooses, have his writ abated, for if a plea in abatement is put in, which is true in matter of fact & good in point of Law, he may enter a "Cassetur brevis" that is pray that his own writ may be quashed. Lutw. 108. Widd. practice. 633.

It is an invariable rule that a matter of abatement in a writ is no cause of demurrer, that is, a plea can never demur an abatement, since a demurrer only goes to the pleadings & has no possible connection with the writ, & the writ is never demurrable. The meaning of this rule is, that he cannot demur to any defects in the writ, & if he does, judgt. will go against him in chief. 1 Show. 91. Lutw. 220. Lutw. 172. Willis 410. 479. 6 Mod. 198. 709. 1 Sac. 15.

In Flowerden there is a precedent to the contrary, but the modern authorities have settled the rule as it is. Flowerden, 72.

But if a person prosecuted for a capital offence, should demur to a matter of abatement, judgt. would not go in chief & he w. be allow. to reply over. 2 Bask. 334.

After a judgt. of respondeat ouster, a second plea in abatement cannot be received; for if he could plead another, he might as well twofold. True if the writ is amended, it becomes a new writ & another plea in abatement may be made to it. Hoob. 126. 2 Linn. 406. on 401. Doct. Pleas Int. 5. Kirby 56. 4 Bac. 51. Chit. 126.

It is a rule of the Com. Law that after a general

Pleas and pleadings.

Matter of abatement cannot be pleaded after the rule for pleading it is out, unless it goes also in bar, & then it must be pleaded in bar.*

So if the matter is both in bar & abatement, it must be pleaded to the action, as *Coverdale* 4th.

Our former practice was to try pleas in abatement without a replication & then they were considered as demurred to. But the practice is now different, and they are answered as any other plea. *Hirby* 49.

Pleas to the Action.

These are of two kinds,

1st. General Issue..... and..... 2^d. Special Pleas in bar.

I. Of the General Issue.

Issue in the law of pleadings is defined to be a single, certain, material point, issuing out of the allegations of the parties & consisting regularly of an affirmative and a negative. And it is called an issue, from the etymological meaning of the word, being derived from the word "exitus", going out, because an issue properly made, puts an end to the allegations & closes the pleadings. 1 Inst. 126th & Bac 54. *Com. Pleas* 11.

W. Gould thinks there is no necessity for the word "material" in the definition, as there really are in pleading, immaterial issues...

And according to the old rule of the Com. Law, there must be in all cases a direct affirmation & negative to form an issue. And so, generally, is the rule at the present day, tho' it has been somewhat qualified, & therefore it may be laid down as a general rule, that every issue

Pleas and pleadings.

consist of a direct affirm. & neg. *Went. 213. 2 Bl. R. 1312. 8th R. 278.*

According to this general rule then an avowment of one party merely inconsistent with the avowment of his opposite party not making a negative does not form an issue. Thus if one party pleads that at such a time, J. P. was alive, & the other pleads that at that time he was dead, this is no issue; it sh^d. have been 'that he was not alive.'

But this rule has been relaxed in modern times, for where the p^lff. said that J. P. was born in France and the D^fnd. pleaded that he was born in Eng. this has been decided to be a good issue. And there it is said by the Court that if the second affirmative is so contradictory of the first that the first cannot be true it would be a sufficient issue. This is extremely loose and I conceive the decision on principle cannot be Law. It leaves to the discretion of the Ct. what ought not to be left. There is no chicanery in the old rule, & it ought to be strictly adhered to. *1 Wils. 6. Stra. 1177.*

There is one instance at Com. Law where an issue is formed of two affirmations. In a writ of right the issue is always thus formed. The Demandant declares he has more right than the Defendant, & the D^fnd. that he has more right to hold than the demandant has to demand. *3 Bl. R. 305. 2 Stra 1177.* This is an ancient & simple case forming an established case, caption.

Issues are of two kinds, General..... or..... Special. *4 B. & C. 59.*

According to Lawes they are of three kinds, General Special or Common. *Lawes 100.* He gives us but one instance of the latter kind, & that is the plea of non est factum to an action of Coverture Broken. *11 Mod. 92. 8th R. 282. Law 1113.*

She

Pleas and pleadings.

The general issue is a denial of all the material allegations in the 5th declaration. It puts him upon the proof of the whole of his declaration. 3. Vol. 305.

A special issue is joined upon some particular part of the Declaration, or on some special matter alleged in the course of the proceedings. And every issue in fact, except a general issue, is a special. 1 Inst. 126^a. Laws 145. 5 Leon. 142.

To actions founded on any misfeasance "not Guilty" is in general the proper issue. To debt on simple contract "nil debet" is the general issue. To debt on specialty, non est factum. To debt on judgment "nil liit. record". To an action of account "non bailiff or receiver". To assumpsit "non assumpsit". To replevin, "non cepit". To disseisin "no wrong or disseisin". To ejectment, properly so called, "not guilty". (Disseisin is brought for an ouster of a freehold, ejectment for an ouster for a term of years.) To an action of warranty of a personal chattel, "non warrant in writ". To debt on a personal Statute, "not Guilty" is a good general issue, tho' "nil debet" is the appropriate genl. issue. The former is good because the action of debt arises ex delicto. The Deft. denies the offence & thus denies the indebtedness founded upon it. "Not Guilty" was formerly held to be a proper general issue to an action of assumpsit, because it was called an action of "trespass on the case". Yet if the party pleads "not guilty" (as it is now settled that it is not the proper issue) and the Deft. joins instead of demurring, and verdict is given (it is a supplement of)

Pleas and Pleadings.

the pleadings are cured... 3. Mod 824. La Ray? 1500. Co. Litt 126.
^{13. 142.}
3. Bla 305. Esp. 167. 1. J. Rep. 462. Stra. 1022. 1. Liv. 142. 4. Mod 84. Moy. 56.

In debt for rent "nothing in arrears" is a good general issue, as being tantamount to "nil debet." Cowp 588. 11 Broul. 19.

In Com. the general issue to Ejectment is, "no wrong or dispossession".

The general issue always contains the words "modest form a", as thus, the Defend. is not guilty "in manner & form" of.

The general issue refers always to the count or declaration and not to the writ. It is a denial of the facts alleged in the declaration & the declaration contains the allegations. Therefore where the writ charges the Defd. with being receiver generally & the declaration charges him with being receiver by the hands of A. B. & now the Defend. can only prove that he never was a receiver of the p'ss's money by the hands of A. B. because this is all that he has to traverse. 1 Inst. 126.

A general issue regularly concludes to the country & is to be tried by the jury. This is not an universal rule at Com. Law for there are other modes of trying such issues. Sometimes the trial is by record, sometimes by certificate, inspection, wager of Law, &c. 3 Bl. 313, 15, 330. 4 Bac. 54. 1 Inst. 126.

According to the strict notion of the common Law the Jury are not themselves the triers of any fact. They are merely the means by which the Judges try a fact. They answer the same purpose as a record, where the fact is to be proved by a record & nil nil record being pleaded. This is agreeable to the strict theory of the common Law. The Jury are the medium by which the Judge is to ascertain the fact.

This.

Pleas and pleadings.

This distinction has been material, for in criminal law it is a settled rule that a man shall not be twice tried for a capital offence. Suppose the jury did not agree in the first instance, or one of them had died during the trial so that no verdict could be found, can he be tried by a second jury? The argument is that he has once been put on jeopardy, & the rule is that no man shall be twice tried for the same capital offence. The answer to this is, the jury have not tried him. There is no trial till after a verdict. But if the Court have never been satisfied of the fact by a jury, they have never tried him. —

When non est record is pleaded, the plff. concludes with a verifications & not to the jury. The fact is to be tried by the Court & not by the jury. But here the issue is not closed. It is then closed by the adverse party's affirming over the existence of the record & praying an inspection of it. This shows that general issues are not always closed to the jury. Laws 148. 2 T. R. 443. 2 Wils. 113. 1 Bos. & Pul. 411. —

And in Civ. by a Stat. the parties may always close the issue to the Ct. by agreement. Stat. 26.7. —

The form of waiving the issue in fact is this, where the Defens. undertakes it, "And of this he puts himself on the Country for trial." If the traverse is on the part of the plff. it is this, "And this he prays may be enquired of by the Country." 3 Bla. 313. 1 Inst. 126. —

But the issue is not yet joined: the other party then avows the similitude; And the Plff. (or Defs.) doth likewise. Laws 147.

In Eng. it seems the omission of the similitude, is

Pleas and Pleadings.

matter of substance, & not aided by verdict. The Courts in modern times have evaded this rule by circumstances really ridiculous. In criminal cases the omission is more matter of form. In civil cases, matter of substance. To avoid the rule, lts. will avail themselves of any thing to permit an amendment. The rule may now be considered as a disaster, tho perhaps it w. be law. Str. 641. Comp. 407.

In Con. it has been decided on the Sup. Ct. and in the Sup. Ct. of Errors that the omission of the similar is more matter of form, & aided by verdict, in the case of Wilmington & Babcock. This is precisely analogous to the English principle. - 2 Bay 392.

Whenever an issue in fact is put to the Ct. the party tendering it must express in his plea that it is so put by the agreement of the parties. - Lecture XIII.

An issue always closes the pleadings, and when well tendered on one side, must be accepted by the other. When the issue is not well tendered, the other party instead of joining may demur for that reason. 3 Bla. 314. 1 Inst. 126. Comth. 88. 1 Saund. 338. Combe. 86.

The words in "manner & form" which are always used in tendering an issue are sometimes words of the substance of the issue, & sometimes mere words of form. The Supl. says he is "not sickly" in manner & form" of. i.e. these words sometimes traverse the particular form in which the fact is said to have taken place, and sometimes they do not.

The rule of distinction seems to be this; If the issue goes to the point of the action, i.e. to the material

Pleas and Pleadings.

allegations in the declaration, the words are mere words of form & of course do not traverse the particular form or mode in which the fact is alleged. Thus in assault & battery. The Defend. is charged with having assaulted the plff. with swords, knives, staves &c. The Defe. pleads not guilty. i. in "manner & form." &c. - these words are here merely formal & it is not necessary that the plff. should prove that he was assaulted with swords, knives, &c. *11. a 317. 2 Lard 319 note. 6. Lawes 49. 120*

But where an issue is taken on a collateral point arising out of the pleadings, the words are of the substance of the issue, & therefore traverse the form in which the particular facts are alleged. Thus if the Defend. pleads a joinder in deed, the plff. traverses it *modo et forma*, here the traverse is the mode & form, & a joinder without deed, cannot support the action and cannot be found by the jury. *Will. Se. 483. 1 Inst. 286. 4 B. & 56.*

This is an arbitrary rule & there cannot be any reason for it. I know of no exception to it however.

The true general rule seems to be, that these words do not put in issue the circumstances alleged as time, place, &c. unless these circumstances were originally material & necessary to be proved as laid. When they were material a traverse *modo et forma* will traverse the circumstances. *Lawes 120.*

An immaterial issue is one taken upon an immaterial point, one which does not decide the merits of the cause. Any issue taken upon matter immaterial, is immaterial, & which is mere surplusage, is bad, and

Pleas and pleadings.

verdict does not cure it. A mispleading is not be allowed ^{the court may set it aside} and the verdict be found. 4 Bac 56. 1 D. 103 Bro 3. 227. Carth 37. 11th 11th 1818

An informal issue on the other hand is one not rightly taken in point of form. It may be upon a point material, & therefore it is not an immaterial issue. An informal issue, defective in form only is aided by verdict. The difference in effect between an immaterial and an informal issue is evident, for in the former case, the issue found does not discover for whom judgment ought to be rendered; in the latter the verdict cures the informality. 2 C. 103 10 D. 19. Carth 37. 12 L. 2319. 86. 3 B. C. 395. 11th 32.

An issue cannot be joined upon what is called in the Law of pleadings a negative pregnant or an affirmative pregnant.

A negative pregnant is some negative proposition which implies an affirmative. An affirmative pregnant is some affirmative proposition which implies a negative.

Such pleading is not bad in substance, it is cured by a verdict & the better opinion is, ill on special demurrer only. 1 Inst. 126. 303. Bro 1. 87. 312. 1 B. C. 445. 5 Bac 201.

But such pleading is good when the negative or affirmative implied is not sufficient to maintain what is alleged on the other side. This rule has not been established by every judicial decision appears perfectly consistent with reason. Lawes 114.

The general issue covers the whole Declaration, so that under it the Defendant may contest all the facts alleged. The gen. issue is not a distinct traverse of each particular fact in the Declaration. (See Supplement N.)

But

Pleas and pleadings.

But the the general issue puts the whole declaration in issue, yet in some cases the general issue is proper to some actions or special contracts, where the facts laid in the declaration are not intended to be denied. This is the case where a contract is void this an absolute incapacity of the obligor. Here he may plead the general issue & support it by proof of the absolute incapacity. As where a feme covert is sued on a bond. Tho she executed the Bond by putting her name & seal to it, yet, in the Law being absolutely incapable of executing a Bond, she may plead the general issue & support her plea by proving the incapacity. Pou. C. 17. Salk 7. 2 Bla R. 1082. Flee. Ex. 162. 12 Mod 609. 6 Mod 311. 2 P. Wms. 145.

But if the deed is void in its own nature & not from any incapacity in the party to be bound by it, the general issue is not proper for the defence. As in the case of usury or any other illegal consideration. The Law requires that there should be pleaded. To an action on deed usury cannot be given in evidence under the general issue. It contradicts the general issue for that is non est factum, whereas the defence is not that it was not his act & deed, but that some new matter can be alleged by way of avoidance. Suppose any other illegality in the consideration that must be pleaded to an action on the deed. This you observe is different from the deed of a feme covert, for in the eye of the Law, she never did execute the deed, & therefore non est factum is a good plea to it.

And it is a general rule of the Common Law, that if a specialty is made void by Statute, the special matter

must

Pleas and pleadings.

must be pleaded. It cannot be given in evidence under the general issue. &c. in the case of usury last mentioned, 11 Cl. 103 or 163. 5 Co. 119. 26 Gr. 72. 2 Bl. C. 292. Esp. 223. 2 Bl. R. 1103.

And where the deed is only voidable & not strictly void, it is not competent for the Defend. to plead the general issue & rely upon the defence. The defence would be inconsistent with the general issue, as in the case of infancy or duress. For to support the general issue of non est factum on the ground of an incapacity in the obligor, it is required the incapacity should be absolute. Esp. 223. 5 Co. 119. Flow? 66. Fil. L. Ex? 162. Kirby 72. 3 Burr. 1805. Stra 498. 26 Gr. 166.

In actions brought upon any deed, release, loss of seal, any alteration after the deed was delivered, and the want of complete delivery are all taken advantage of under the plea of non est factum. 5 Co. 119 ^{oth.} 11 Co. 27. Esp. 223. 4.

If such alteration or erasure be made by a stranger in an immaterial part & without the privity of the obligor, the deed deed is not violated. Therefore, in such case, the plea of non est factum is ill.

But if the alteration &c. were in a material part, the instrument would be vacated; & if any alteration &c. be made by the obligor or by his procurement even in an immaterial part, the instrument is vacated.

And in general it is true, that under the general issue, matters of fact only & not matters of Law are in question. By matters of fact is meant, matters of fact contained in the declaration, not that no question of Law can arise under the general issue, for many oftends.

Pleas and pleadings.

This plea does not in general include other matters of defence arising from special matter. 10 P. 224.

It is a general rule of the Court. Law that in the action of Indeb. assump. any thing which shows that the plaintiff has no right to recover at the time of plea pleaded, may be given in evidence under the general issue. This rule or principle applies to no other action, & how far it applies to express assumpsits I do not know. On this point I have never satisfied myself.

In Indeb. assump. the rule is perfectly proper. The promise is a legal duty. Now any thing which shows that the legal duty does not exist, shows that there never was an assumpsit or promise. Thus in indeb. assump. usury may be given in evidence under the general issue, because if there is usury, he never did in legal contemplation assume & promise. So duress may be given in evidence under the general issue, for this shows there is no legal duty, & this is the only material fact contained in the declaration. Release or payment may be given in evidence, because they discharge the debt or duty. Stra. 498, 2 Burr. 1012. — L. Ray? 787. 2 H. Bl. 143. Doug. 108. 3 Burr. 1355.

But (whether) this rule is applied to express assumpsits in Eng. (I know not.) Our writers lay down this rule, with reference to assumpsits generally. I believe the rule is intended to apply to indeb. assump. only. On principle it cannot be extended to special assumpsits (though it is done in some reports).

The reason given for this course in pleading is, that the action is not strictis juris, & being an equitable.

* See Buley 5 P. 512. 2 H. Bl. 140. 18. v. 147. 5 P. 512. 60. 1. & L. Ray. 15. 1778. C. 10. 10.

Ideas and pleadings.

action any evidence which shows that the deft. ought not to recover is proper evidence under the general issue.

In indub. assump. the promise being merely a legal consequence of the duty stated, whatever extinguishes that duty, discharges the promise.

Notwithstanding the rule above, the Stat. of Limitations, Tender, Set-off, Accord & Satisfaction & Bankruptcy must be specially pleaded in an action of Assumpsit. These are matters of Law which go not to the gist of the action, but to the discharge of it; i.e. they do not deny that there was once a cause of action. This is not always true in the case of Tender, but it is, in any of the other cases. The Stat. of Limitations is as much matter of Law & in the same sense as a release before mentioned. Chitty 198. Tidd 375 Esp. 147. 1 Sams 283, 2d 2. 3 Bac 518. 32 May 25 56.

In Lord Raymond it is said, accord & satisfaction may be given in evidence under the general issue, but the modern writers deny this to be law. Ed. Ray. 153.

The reason why these distinctions are taken, is not owing to any original mistake in the principles of pleading. The reason why these distinctions continue is, that in the case of release and payment they were made in actions trist on indub. assump. & holden good under the general issue. In the case of Bankruptcy, Tender &c. they were trist in the first instance on express assumpsit & holden not to be good under the general issue.

In doubt or simple contract the Stat. of Limitations may

Pleas and pleadings.

may be given in evidence under the general issue. So
may a release, for the defence does not contradict the
plea. Nil debit is on the present time. L. Ray. 386.

Palk 278. 28 p. 26 v. 5 Mo & B. 1 Jan 2. 83. 52. 2. Ser. 2. 15.

The great criterion, in order to determine when a given defence may be offered under the general issue & when not, is this - if the defence is inconsistent with the plea of the general issue, it cannot be given in evidence under it; if it does not contradict it, it may. This rule you have observed is by no means universal.

In actions of assumpsit express or implied, advantage of the Stat. of Frauds & perjuries may be taken under the general issue, tho the party may plead it specially if he chooses. 1 Bro. Chy. 92. 2 Twiss 214. 1 B. & C. 214

But this looseness of pleading which obtains in indeb. actions, is not allowed in cases generally, not even in cases of torts any more than in actions on specialties. In torts he cannot give a release on evidence under the general issue. So of license or any justification.

Other indeed it is a general rule, that a Defendant
 may give in evidence under the act, issue in an action
 of trespass, any matter of justification. It must be mat-
 ter of verification or denial. 4 Bac 60. Bul. ch. 17. Inst.
 282. Comp 478. Hob. 174. 5.

And it is an universal rule that every defence which cannot be specially pleaded may be given in evidence under the general issue. And thus a defence which cannot be specially pleaded, because they unite to the general issue. Law III. —

Pleas and pleadings.

In Con. there is a very different rule from that of the Com. Law. The one introduced here by Stat. which extends to all actions is, that the Defence. may give in evidence any matter of defence whatever under the general issue except some act of the plff. which acquits the Def. from his liability. Stat. 342.

The act of the plff. here mentioned is some act which operates as a discharge of a right of action once existing, as release, accord & satisfaction, award of arbitrators, recovery in a former action. 2 Swift 203.

An act of the plff. antecedent to the commencement of action & which operates as a justification may be given in evidence, as license. - Kirby 239.

So any other act of the Plff. which shows he never had a cause of action may be given in evidence under the general issue, as Discharge, usury, Infancy, Coverture &c.

It has indeed been decided by our Sup. Ct. that usury must be specially pleaded to an action on a promissory note. This is contrary to the true meaning of the Statute & the decision was reversed by the Sup. Ct. of Errors, June 1808.

The Stat. of Limitations may be given in evidence under the general issue. This applies in cases of Torts as well as in cases of Contracts. -

It is said by Swift that the Stat. of Limitations can't be given in evidence under the general issue in Con. This is not Law of the reason given does not apply under our Stat. Besides it does not apply in the case of Statute of Limitations. 2 Ho Bl. 143. Doug. 108. 2 Swift 215.

Pleas and pleadings.

The Stat. contains an exception before mentioned "of any act of the Off." &c. But in Book debt a release may be given in evidence under the general issue. The Stat. was not intended to prevent the party from giving in evidence which he c. at Com. Law. 2d. May 3566. 2d. 278. 2d. 278.

But it has been held that a release can not be given in evidence in an action of indeb. assumps. under the general issue. This decision is incorrect, for this is a defence which may be made at Com. Law to the same action. The case was *Brace & Catlin* June 1804.

The Defend. may, instead of pleading the general issue deny any single traversable allegation going to the gist of the action, & conclude to the Court try. He ought to answer to the rest. This is a convenient manner of forming an issue, & is what is called a special issue. It is however seldom done. 1. Inst. 282. 2. Inst. 195. 3. Inst. 171. 2. 135. 1. 2. 4. Inst. 202. 7.

A special plea regarding to Lecture XIV. the general issue is regularly inadmissible. A traverse of a single fact is not a special plea, because a special plea alleges new matter. The rule is made, because if such a plea were admitted, it would unnecessarily lengthen the record; and because it tends to refer to the Ct. matters of fact which ought to go to the jury under the general issue. Thus in *Trespass*, the Defend. pleads an alibi. This amounts to the general issue. He does not present any new matter which in its legal operation avoids the facts alleged. This plea does not admit the facts & avoid them; no, for it denies the *Trespass*. If a release has been executed, it will be a conclusion of Law that there is no right of action.

Pleas and pleadings.

Of course it can be pleaded specially. But it is not mat-
ter of Law whether the Defend. was a tenant, out of the realm
when the Trespas was committed. It is more matter of fact.
5 Bac. 201. 2. Cro. 201. 268. 329. Hob. 127. Esp. 312. Mont. 249. 313. 329.

But to this rule there are some exceptions & some dis-
putes in the Books how the defect shall be taken advantage of.

In the first place. A special plea amounting to the
general issue is good if it contains special matter of
justification, because the matter of justification is a con-
clusion of Law & ought to go to the Court. In one certain cause
of action the party may be justified as to some allegations
& not guilty as to others. It may be proper then to unite the
denials with some matter of justification. 3 Lev. 41. Cro. 2.
278. 5 Bac. 202. Hob. 127. 209.

Again. At the Common Law in the actions of Trespas,
& assize the Defend. may plead specially what amounts
to the general issue by giving colour to the plff. If he only
pleads title in himself it w. be the gen. issue ^{if he does not have} & no more. 3 B. 309.

This giving colour consists in alledging some forged
matter in favour of the plff's right of action, in order to jus-
tify a special statement of his own action. 10 Co. 90. Cro. 122.
3 B. 309. Lammes 51. 126. 150. - 513. 208.

But a special plea of title in an action of Trespas
is warranted by our Stat. because it is said, where there is
a plea of title before a single magistrate, it shall go up
to the Ct. under particular circumstances therein men-
tioned. Stat. title Trespas.

The Judges may in their discretion allow a special
plea in Bar amounting to the general issue in some cases

Pleas and pleadings.

the this discretion is regulated by an established rule; and the rule as expressed is, that if the facts pleaded are such as may breed a scruple in the lay gentle the matter may be specially pleaded; that is if the facts ^{raise} "nice questions of Law which ought to be tried by the Court. Cro Eliz. 876. 4 Bac 62. 63. 2 Mod 274. 166.

But there is some contradiction in the Books as it respects the manner in which the plff may take advantage of the defective plea.

In some of the Books it is said to be a good cause of Special Demurrer. But how can this be, when the Ct. in its discretion may allow the plea. A demurrer must decide the issue of Law. The question is stricto juris between the parties & the Ct. have then no discretion. The plea cannot then be demurred to. According to other authorities such pleading is not a ground of demurrer, but the ground of a motion to the Ct. that the general issue, or nihil dicat be entered by the Defend. This I conceive to be the true rule. 14 Co 95th. 5 Bac 202. Cro 6. 112. 157. Hob. 127. 2. Cro 3274. 5 Mod. 18. Hob. 127. 1 Inst 303^b. 2 Ray 431.

But suppose the Court will not allow the plea on a motion by the Plff. & they order the Defend. to plead the general issue, or enter a nihil dicat & he refuses (as they cannot compel him) but joins in a demurrer. In this case I suppose judgment will go agt. him on the demurrer. In this way the difference in the Books above specified may be reconciled. The regular way is to move the Ct. for the gen. issue & as above stated, but if the Plff. refuses to do this judgment go agt. him on the demurrer.

Warrant pleadings.

It is said & correctly said, that after the Court have allowed the plea or motion & ordered the Defend. to, & the general issue & he refuses the Def. may take judgment by nil dicit. You see that he is not bound to demur. 5 Bac 207.

In Con. it has always been the practice to demur specially & take judgment in chief upon it till lately 2 Dey 431.

But there is a very material difference between a special plea amounting to the general issue & a special plea alleging facts which in evidence would support the general issue; for the latter does not necessarily amount to the general issue. Thus a release to debt. on simple contract is pleaded; this is good pleading, yet it would support the general issue. So of coverture, duress and usury the chy all support the general issue by being given in evidence under it, yet pleading coverture &c. is not pleading the general issue. Chitty 197. 8. Path 394 & 5 Mod. 18. L. Ray? 88. 9. Leath 356. - Lams 112.

The specific difference between these pleas may be easily seen. A special plea amounting to the general issue is one which contains a special statement of facts contradictory to the allegations in the Declaration.

On the other hand no plea in general which admits that there was once a cause of action, or which admits the allegations in the declaration amounts to the general issue. The facts pleaded might in due time be given in evidence under the general issue, but they do not amount to it. The general issue is a denial of all the allegations in the declaration. As in the case of a release specially pleaded. It may be given in evidence under the

Pleas and pleadings.

the general issue to debt on simple contract; but it admits that there once was a cause of action, & therefore when specially pleaded does not amount to the general issue, because the general issue denies there ever was a cause of action. So of coverture, in Sanby 10 L. Rep. 388. 1. 566. 767. Cro. E. 871. Chitty 197. 2. Gaith. 133. Salk 394.

According to the distinction it is customary in con. to plead specially other defences than those originating from "the act of the p^{ty}." in actions on contracts.

There is another kind of plea necessary to be noticed. I mean a plea stating special facts which go to prove the general issue & conclude with the general issue in point of form. It is in fact the general issue, and not a special plea amounting to it. Thus to an action of debt on Bond, the defnd. may plead that the debt was delivered to J. S. as an escrow to be delivered over to the p^{ty} on a certain condition, which condition has not been performed by the p^{ty}. & therefore it is not his (the defnd.) act & deed in manner & form as is alleged. In the case of coverture this was constantly the manner of pleading the general issue, indeed the ancient rule required it. 42 E. 164. Salk 274. 10 Mod. 920. How. 66.

This is the general issue with an issue from the now known word issue, so, because the issue precedes the general issue in form.

And it is remarkable that there is a contradiction in the Books as to the manner of closing the plea. Some of them say it must close to the Country & some say it may conclude with a verification. Every definition shows that it must conclude to the Country. If it con-

cludes,

Pleas and Pleadings.

concludes with a verification it is not the general issue with an issue. It is concluded by the general issue that the Defend. may have the facts go to the Country. If it concludes with a verification it is ^{if so} facts a special plea amounting to the gen. issue which w^d be bad.

As to the conclusion to the Country you may see (Plow. 46. 1 Vent. 9th 24 Bac 62 note 89. 3 Keble 26. Exp. vi 222. Halk 274

As to the verification see 4 R. Ev. 164. 5. Moy 112. Moor 30.

As the Law now stands the Defend. is never obliged to plead in this way. When ever he can plead in this way, he may plead the general issue in its most general form. The only advantage to the Defend. is that he can state a question of Law on the record which would otherwise be written with the question of fact. It is in general more useful to the pl^{ff}. than to the Defend. because it shows the special facts which are relied upon as defence & confines the evidence entirely to those facts. 4 R. Ev. 163. 164. 5.

And it seems that the plea may be demurred to tho it concludes to the Country, because the conclusion is made from facts stated. And if those facts will not support the general issue it ought to be demurred to. The question is however doubtful; there is very little said in the Books. In fact the general issue in its most general form, may in its nature be demurred to, tho if properly pleaded the demurrer must be overruled. 4 R. Ev. 164. 5.

I observed that this was anciently the mode of pleading in the case of coverture. Anciently if the specialty was void by reason of something extrinsic as coverture,

1 Pleas and pleadings.

or became void by reason of something exposed facts, as
nature of the Defend. was not allowed to plead the general
issue, except with an issue. This is not now the case. In
and Ld. Holt says, all special non est factum are
imperfect because they subject the Defend. to the onus pro-
bandi. ^{as to 218} Thus far of the General issues.

II. Special pleas in Bar.

Pleas to the Action of the second kind are special
pleas in Bar.

A special plea in Bar is usually defined to be, one
which admits the facts stated in the declaration & avoids
them, i.e. contains some matter in avoidance of the... ^{Laws 37. 115. 124.} & Bac 2.

But tho this is generally it is not universally true,
for a plea in Bar does sometimes traverse some part of
the Declaration. Thus if in Trespas the Defend. pleads a re-
lease, he must traverse that he has committed any
trespass subsequent to the release. Hol. 104. 450 & 70. Cro.
Eliz 30. 418. Lams 116. 126. 121. 178. 148. 2 Vent. 79.

And indeed there is a species of special pleading
or rather one defence pleaded in the form of a plea in Bar
which does not admit the facts going to the gist of the
^{the regular duty being} action; this is the defence of an estoppel. Lams 146. 158. 161. 172

An estoppel is some matter of record, or some writ-
ing under seal, which prevents the party from pleading
a particular fact. It precludes the p^{ty} from averring the facts men-
tioned in the Declⁿ. This is a plea in Bar, but does not admit any of
the facts stated. Lams 88. 130. 140. 3 Bla 308. 3 East 346. 11 Mod 32

After

Pleas and pleadings.

After all, I do not know any more adequate definition of a plea in Bar, that can be given.

A plea in Bar however does regularly admit all traversable facts which are not traversed by it, and is always an avoidance of the things not traversed. Fulk. 91. 4 Bacon 2.72.

But tho it is generally true, that a plea in Bar admits all traversable facts which are not traversed yet every plea of justification must expressly confess the fact intended to be justified, because it is said to be absurd to justify a fact which he does not confess. ~~See no more in the case~~ Esp. 318. 1 Saund 14.3. 28.1. 3 T. R. 298. Fulk 399. Carth 380.

Lecture XV.

A special plea in Bar always alleges some new special matter, & therefore it is called a special plea in Bar. This distinguishes it from the ordinary general issue which alleges no new matter.

This special matter is usually in the affirmative but it is not always, for if an action is brought upon negative covenants, if he would plead that he has not broken the covenants, he must plead in the negative. 3. Bla. 309.

This plea as it alleges new matter must regularly conclude with a verification, instead of closing with Covenanter. This is the established mode of keeping the pleadings open. As long as new matter is pleaded the adverse party must have an opportunity of answering it. 2 Burr. 772. 3 D. 1725. Dares 158. Comps 576. 1 Saund 103 n. 2. 3 B. & 309. 10.

There is indeed, introduced by Stat. in Eng. a special plea

Pleas and pleadings.

plea concluding to the country, & this is the plea of Bankruptcy. It is called the general plea of Bankruptcy. The Stat. 3 Geo. II. allows the Defend. to actions on contracts to plead the plea of Bankruptcy specially & conclude to the country. Lancs 145. 224. 227. This is an Anomaly in y^e Law.

But a plea which is merely in the negative need not conclude with a formal verification, since the party taking the negative of the issue is not to prove it, & therefore it would be absurd for the party to conclude in this manner "and this he is ready to verify" &c. when he is not to verify it. * Willis 5. Lancs 145.

As a general rule, a special plea admits, as of course, what it does not deny. Hence nil debit. is no plea to debt or Bond; because the plea of nil debit. does not deny the execution of the instrument or debt, and as it contains no new matter in avoidance it is not a special plea. It therefore admits a right of recovery. Harb 33. 332. 4 Bac. 83.

There are some general requisites to be observed in every special plea.

Lord Coke's general rule is, that every Defd. must plead such a plea as is pertinent & proper according to the quality of his case, estate & condition. This rule is so general that we get no adequate idea from it. It amounts to this, every one who pleads, must plead a good plea. 1 Inst. 285. 303.

But there are rules more particular.

1^o. Every special plea must contain issuable matter, i.e. it must consist of such matter as that an issue may be taken upon it. Otherwise the opposite party could not
* See Supplement p)

Pleas and pleadings.

traverse what is all adgd. because what is not issuable
is not traversable. In fact if it is not issuable it is not
triable. 27 Wils 138. 94. Laws 137. 8.

And every special plea in which fact & Law are so blended that they cannot be separated is ill. The matter raising the question of Law ought to be separately & substantially pleaded that it may be separated from the mere matter of fact. Thus in trover for goods, if the Defendant should plead that he is lawfully entitled to the goods & all Felons & thieves agree that these were the goods of a Felon, this plea w^d not be good in the first part of it, for the traverser w^d be that he is not lawfully entitled, and the questions of Law & fact would go together. He should plead the special matter of fact which constitutes the lawfulness of his claim & not plead so generally as in the case supposed. Lawes 288. q^{uo} 29th

2nd. Another very important rule is that the plea in Bar, ^{or the whole declaration} must cover the whole gravamen or cause of action or it is ill not only as to that which is omitted, but in toto.

Thus in an action, for an assault, battery and wound-
ing, if the Defend. should plead a justification for the assault
and Battery only, the plea would be bad in to and Damages
might be recovered agt. him on the whole declaration. The
Law will not allow the Defend. to take a limb off the de-
claration. He must answer the whole or none. The plea
must cover as much ground as the declaration does. ^{(see}
~~time~~ ⁱⁿ Cotey parva ^{of} ~~the~~ ^{the} ~~page~~ ^{page} 7. 7) Hob. 104. 1 T. Rep. 630. Sams.
¹⁷¹ 135. 1 Sam. 2. 28 note ^{to} Sam. 2. 127. Cro E. 268. 3d Co. 375. Hob. 327. 328.
[* See Supplement, t.]

Pleas and pleadings.

So in an action of Trespass; if the Defend. pleads a release for a trespass once committed on a certain day, he must traverse all other trespasses for the plff. may prove any one of a hundred committed before the suing out of the writ.

So also to an action agt. a Bailee for goods delivered to him to keep & carry &c. he pleads that he was discharged from the duty of carrying but said nothing about the obligation to keep, the plea was demurrable because it answered only a part of the gravamen. Hob. 28. 4 Bac. 88.

So in an action of Steward when the words were "She is a thief & has stolen 20^s" a plea that she was a - of - and has stolen 2 shovels &c. was not good. Cro. 167^b. 2 Roll. 414.

By this rule it is not required that the Defend. in one plea, should make an answer to the whole declaration. He may plead not guilty for instance, as to one part and a justification as to the rest. He may traverse a part, plead in Bar to a part, & demur to the rest. But all his plea taken together must answer the whole gravamen or cause of action.

The same general rule holds as to all the subsequent pleadings. The whole gist or substance of the plea or Bar must be answered. To the replication, rejoinder &c. must also be substantially answered or the plea will be defective.

1 Faunt 28 note. 1 T. Rep. 40, 2 Sand 127 (Mrs. insured in 4th sup. by mistake)

With regard to pleas not answering the gravamen or cause of action, this distinction is to be observed.

If the plea imports to be an answer to the whole & is in law a good answer to part, only the plff. may demur because here it is an answer to the whole declaration, but an insufficient answer. 1 Faunt 28 note.

Pleas and pleadings.

On the other hand if the plea imports or begins as an answer to part only it is a discontinuance & the plaintiff should not demur but take judgment by *nil dicit*.
3 Saek 179. L. Ray? 231. Stra 303. 1 B. & P. 427. 4 Co 62. Laws 135. 6. 28. 200. 1

It is said in some of the Books that if the plea imports an answer to part only when law good as to the whole, it should be demurred to. (But this is not different from the other case. I conceive it would be proper in this case to take judgment by *nil dicit*. It makes no difference now good his plea may be in substance if it only imports an answer to part. The Books are contradictory on this point) Laws 135. 6. * Nothing said by Ponds of what is contained within the bracket above in his lectures: 1813, therefore it may be enclosed. See with. St. 11.

A justification or any other defence which answers the *git* of the action covers all matters of aggravation, & therefore is an answer to the whole declaration. This is a defence which satisfies the rule.

Thus in trespass for breaking & entering the plaintiff's house & expelling the plaintiff therefrom a plea which justifies the breaking & entering only is good for the expelling the plaintiff is more matter of aggravation. Such a plea is always a good answer to the declaration; it may not be to some other parts of the pleading, for there may be what is called a *novel assignment*. 12 R 636. 17 R. 136. 555. 5 Bac 213. Laws 70. 163. 240.

A *novel* or *new assignment* is defined to be a more particular statement in the replication of what is stated more generally in the declaration. It is in the nature of a new declaration. 30 R. 292. 1860. 479. 534. 3 Bla 311. 3 Wils 20.

Suppose then the action before stated of trespass. The plaintiff is about to rely on the expulsion as a distinct

3

Pleas and Pleadings.

trespass, & a substantive ground of recovery. He may do it by way of new assignment, which makes it a new declaration. —

As it has now become a new declaration the Defd. may plead to it as such; i.e. plead not guilty, or any other plea which he might have pleaded had it been the only thing contained in the Declaration. Lewis 165. 240. 1 San 299. 3 East 294.

You will perceive the office of a novel assignment is to take out of the plea in Bar, or the defence which the Defd. makes in his plea in Bar what upon the face of it, it is a good answer to, or in y^e single case (only) last cited of trespass, it is to transform what appears to be only matter of aggravation into y^e gist of y^e action. Not always so. The novel assignment must always contain an avowment that the trespasses contained in it are different from the trespasses mentioned in the plea in Bar.

And it is to be observed further, that the avowment in the novel assignment cannot be traversed, for in such a case as this the Defd. should plead the general issue "not guilty," & unless it appears in evidence that the trespasses are distinct, the novel assignment cannot be supported, & the Defd. will prevail upon his general issue. 1 San 299. notes (Lewis 241. 164. 5.)

It is as anciently necessary for the Defd. to set forth specially all the particulars, however numerous they may be, of any defence consisting of special matter of avoidance. 1 Inst. 303. 3 Co 133. 4 Bac 90. 1 T.R. 753.

But now general pleading is sometimes allowed to avoid prolixity and the rule is as expressly broken as when the particular facts containing the defence, if specifically set forth would tend to infiniteness. i.e. to great prolixity.

Pleas and pleadings.

prolixity general pleading is allowed. Where a man is bound to perform covenants containing a great variety of acts he may plead performance generally. He need not plead all the particular facts, where it is manifest that pleading thus would tend to great & inconvenient prolixity. Cro. E. 749. 916. 1 Sid. 215. 2 Vent. 256. Coult. 575. Lawes 60. 1.

As if a Deputy Sheriff, giving Bonds to serve all writs, should be brought on there for omitting service he may plead performance generally without naming any particular writ, tho' the defence consists of matter in avoidance only; for otherwise it would be impossible for him to plead well.

But the general plea of performance cannot be pleaded to an action of covenant where some of the covenants are negative; because it is said negative covenants cannot be performed. He may plead performance as to the affirmative covenants, but not as to the negative ones. He must plead that he has not performed the covenants which he covenanted not to. If he pleads performance of negative covenants, it is merely a formal defect. It can be taken advantage of only by special Demurrer. Cro. E. 691. Esp. 505. 1 Inst. 303. Cro. E. 232.

* It is a general rule that surplusage in a material point vitiates the plea. But surplusage in an immaterial point does no harm. It is considered as mere surplusage & comes under that denomination. 2 East 333. 1 Inst. 303. 2 Cal. 332. 333.

By surplusage then is meant, foreign matter, or surplusage in a point immaterial. Thus suppose the poss. should state in his declaration that on the first day of Nov^r 1812. he lost his goods & on the same day they came into the hands of (See Supplement U.)

Pleas and pleadings.

the Defend. who on the first day of October in the same year, converted them; this would be all on general demurrer, for this day is a point material. 2 East. 339.

But if he had said "afterwards on the 1st day of Octr" this would be good after verdict & the words 1st of Octr would be rejected as surplusage.

As to the form of beginning & concluding a Plea in Bar. See Laws 138. 145. 159. 161. * Lecture. XVII.

Of Traverse.

There are many things to be considered which relate to Pleadings in general. And first of a Traverse. This does not come under any general division. It is by itself.

A Traverse is a denial of some particular point in the pleadings & always renders an issue. There is indeed a particular kind of traverse which itself forms an issue, but this is not now to be considered. The general rule is, that every traverse renders an issue, & this traverse may be taken to any special matter alleged on either side. No new matter alleged is the subject of a traverse. So a traverse may be taken to any part of the pleadings including the Declaration. It may be taken to a part of the Declaration, to any dilatory plea, or to any special plea in Bar. It cannot clearly be taken to the general issue. † Inst. 282. & Bac. 67. Vol. 195.

It is usually taken with the words "à l'encontre," - In English "without this."

(See Supplement iv. - † See Supplement iv.)

He is

Pleas and Pleadings.

It is said by Bacon that a traverse when properly taken "closes" the issue. 4 Bac 67. This as a general proposition is clearly incorrect. This formal traverse which is taken with the words *absque hoc*, (which is the only form of a technical traverse) does not regularly close the issue, but merely tenders the issue, & regularly closes with a verification; but a verification is never the form of closing an issue. 6 Co 24. Lams 121. Stea 871. 1 Burr. 321. Doug. 412. 5 Co 109.

When suppose Diffe. pleads in Bar that T. did swear in fee & thus denies title thro him. The p.p. replies that he did swear on land, "without this" that he did swear in fee. This is a formal technical traverse; but this traverse does not close or even tender the issue, but merely tenders it. The issue is then formed by the Defendant's replying, over that T. did swear in fee, in manner & form as he had above alleged in his plea in Bar.

These words *absque hoc* are words of strong denial on the law. They mean (as in the case above mentioned) that T. did swear on land, & therefore that he did swear in fee is excluded.

But these words, *absque hoc* are not absolutely necessary to constitute a traverse, for it is better that the words "et non" will answer. Yet they are almost always used & contain a denial of what is alleged on the other side, but not such a denial in such a form as to close the issue. 1 Tames 12. 2 W. 16. 439. Lams 113.

It is said as a general rule that a technical traverse, i.e. a special traverse, concludes with a verification.

Pleas and pleadings.

But a general traverse which reaches the whole of what is alleged on the other side, concludes regularly to the country. Thus from the replication "*de injuria*" the conclusion is to the country. The Defend. to an action of assault & battery pleads "*son assault dénié*". There is a general traverse going to all this defence. It is on these words, viz., "*de sua propria injuria absque tali causa*". These words are a general negation of the whole defence pleaded, & the traverse concludes to the country. 4 Bacon 67. 68. Doug. 90. Gal. 4. 4. 2 T. Rep. 439. 1 Bos & Pul 76. Doug. 412. 1 Sand 103. 23. 8 Co 66. 2. 4 New R. 364.

Now it may be asked what is the reason why a special, i.e. common traverse should conclude with a verification & a general traverse to the country. For the former there are two reasons. First, It may be immaterial & if it is the other party is not bound to join it, and if, not bound to join in it the other party, ought not to conclude to the country. The pleadings should be left open that the party agt. when the traverse is made may abandon it if he has any good reason. Secondly, In certain cases where the traverse is material, the other party may abandon it & pass it by altogether, & take a traverse himself upon the inducement, which he could not do if it concluded to the country. Therefore a special traverse should conclude with a verification?

But in the case of a general traverse these reasons do not exist. In the first place it certainly cannot be immaterial, because an immaterial traverse, is a traverse of an immaterial part of a good declaration or plea. But a general traverse, reaches the whole of what is alleged.

Pleas and pleadings.

consequently it reaches the good as well as the bad. Secondly, in such a case it is impossible that such a general traverse should be abandoned, because as the general traverse reaches the whole matter alleged, the party cannot abandon the subject of this traverse, as it would destroy whole defence which he has pleaded, without being guilty of a departure. *Lewis 152.34.*

The words *verdict* & *verification* as they relate to the conclusion of a plea are used as synonymous.

It is said however by Buller who was an eminent special pleader that a general traverse may in many cases conclude either with a verification or to the country, because says he "so are the precedents." Now a special traverse never can conclude to the country. There is no reason why a general traverse should conclude with a verification. The pleadings never should be left ^{open} unless the principles of pleading require it. And as the general traverse reaches all the facts in the case, it clearly is the proper time to close the issue. The principles of pleading in the case of a general traverse certainly do not require to be left open, but so is the law, that they may be. *2. T. R. 463. 2 B. 1027.*

As in the case above stated, where B. & F. to assault & battery pleads son assault. *dissem.* The *proff.* denies the whole by a general traverse. He may conclude with a verification or to the country, what use is there in granting this liberty. The *proff.* cannot deny to it, or allege any new matter. There is no reason in it. But in every case a general traverse cannot conclude either way. It is only in those cases, where it has been allowed, for in no others do I think it would be.*
(*See Supplement D.)

Pleas and pleadings.

A technical traverse, that is consisting of the words "allegue hoc," differs from a direct & positive denial, of a fact not only in its diction, phrasology or form, but generally in its conclusion. Where the traverse is a special one, it always differs in both; where it is a general one it differs only in form and not in conclusion. 4 Bac 67. 77. Roay? 98. 11 Bur. 321. Lawes 116. 149. 2 T. R. 439.

And this direct & positive denial of a fact is proper where the party tendering the issue does not find it necessary to introduce any new matter. Thus where one Defendant pleads in abatement that one Co Defendant is dead. The plaintiff replies that he is alive allegue hoc, that he is dead. This is a technical traverse but instead of this the plaintiff may reply that he is not dead & put himself directly upon the Country. Thus again, the Defendant pleads an accord & satisfaction. The plaintiff replies some new matter & concludes with a technical traverse. But if it is not necessary to allege new matter he may reply that it was not accord & satisfaction & conclude directly to the Country. To you see this technical traverse differs from a direct and positive denial in form.

It differs also in conclusion; for a direct & positive denial must conclude to the Country, but a special traverse always concludes with a verification.

Thus in assumpsit, after the Defendant has pleaded it, the plaintiff may reply that the contract was made on good & lawful considerations &c. (stating what it was) allegue hoc, that it was then & there, lawfully agreed &c.

But he is not bound to state the considerations &c. but

Traversing Pleadings.

may deny the ~~defence~~ allegations directly & positively & then he must conclude to the country. But if he elects the first mode, he must conclude with a verification, because he alleges new matter in stating a good consideration.

This mode of traversing a Particular fact by way of positive & direct denial obtains only when you give some other answer to the rest of what is alleged on the other side. ^{2 Linn 206. 207. 1 Linn 103. 2 Burr 104. King? 98.}
the other side. ^{2 Linn 371. Linn 118. 118. 149. 2 T R. 439.}

It has been a subject of much controversy in the Books, whether a wrong conclusion in these cases is matter of form or matter of substance. I have already observed that in general, a general traverse should conclude to the country. It is supposed when it ought manifestly to conclude to the country it concludes with a verification, is this a defect in form or substance? There is very little said upon it in the Books. In Sir T.

Raymond P. 94. it is said to be a defect in substance. In another case in Bristle 240 the Ct. expresses a doubt whether it is a defect in form or substance, i.e. whether it is de or general or special demurrer. I confess on principle I see no difficulty in settling this question & there never would have been any if the Science of Pleadings had always been understood, ~~as~~ as a collection of principles. In my opinion it is only a defect in form; for the objection is not that the party has not traversed all that is necessary. It is that he has not concluded his traverse properly. He has pleaded what is sufficient for his purpose. He has only failed to plead properly. Is it? therefore think it all only on special demurrer. Cro Car. 117. 164. It is now settled by Stat. 4. 5 Ann to be de in form only. & an averment is to be taken by Spec. Demur. only. as to the Stat. see 1 Linn 103. 285 N. S. 2 Linn 100 N. S. 1 Burr. to amount 94. 5.

Measure Pleadings.

I have observed that there are two modes of denying an allegation. 1st By a technical traverse, 2nd By way of positive & direct denial. Further, when an allegation on one side is expressly denied on the other by way of direct & positive denial, a formal traverse superadded to this denial is needless & improper & demurrable. If it might be done parties might deny directly & traverse infinitely. Thus plff. avers performance of a condition precedent. Defend. pleads that he has not performed the condition of "without this" that he has performed of. This traverse is improper. To suppose the plff's right of action is to accrue when he attains the age of 21 years. Plff. then avers on his plea, that he has attained this age. The Defend. pleads that he has not attained this without this that he has attained to the age of 21 years. This traverse is demurrable. The party who he denies expressly, should have concluded directly to the contrary. 2 Hen 8th. Lewis 117. Cro Eliz 155. 10 Wm 101. Ray 98.

Thus far I have endeavoured to show the general nature of a traverse with the manner of its conclusion. I must now consider when it is necessary to take a traverse and when not.

Under this head it is a general rule, that when one party alleges new matter inconsistent with any antecedent allegations on the other side, but which does not form an issue upon them, a traverse of these allegations is not only proper but necessary. There can be no traverse with words of denial, but when a man alleges new matter merely inconsistent with what is alleged on the other side, & does not form an issue, it is not traverse. Cro E. 30. Dyar 365. 11 Wm 625. 10 Wm 22. 3 B Co. C. 310. 1 Sam 517. 178. 1150. 150. 1606 105. 20 Wm 207. 6. note 4. 209 note 8.

Plenary Pleadings.

Thus suppose one Defend. pleads that at the date of the writ, his Co Defend. was dead. The Plff. merely replies that he was alive. This is bad pleading. He should have replied, that he was alive, without this, that he was dead. And the issue is not regularly formed by his affirming that he was alive. There are two affirmatives. I suppose there is no inducement necessary in this case. He might have said that he was not dead by way of direct & positive denial & then have formed the issue...

Again, Plff. declares that S. P. died seized in fee. The Def. pleads that he died seized in tail. This is bad pleading. He should have added abque hoc that he died seized in fee. Therefore the rule is general tho not universal that when one party alleges new matter inconsistent with the allegations on the other side, but which does not form an issue upon them, he must superadd a Traverse.

The new matter in this case which precedes the traverse is called the inducement to the Traverse.

As in the case above - the Def. pleads that S. P. died seized in tail, abque hoc that he died seized in fee. This new matter preceding the abque hoc is the inducement, that which follows from the abque hoc is the Traverse itself.

The object of the last rule is to compel the parties to form an issue on what each alleges inconsistent with what has preceded.

But the rule that there must be a direct affirmative & negative, has been relaxed in modern times.

As where the Plff. avers in his Declaration that S. P. was born in Eng. The Defend. pleads that he was born in

Household pleadings.

in France. The Ct. held that this was issue enough.

And a rule like this seems to be laid down by the Ct. that where that which is affirmatively alleged on one side is so inconsistent with that is affirmatively alleged on the other, that the first can in no sense be true, there is no matter whether there is a direct affirmative and negative or not. This is a deviation from the rule and is an unfortunate decision. 1 Wils. 6. 2 Stra. 1171.

This general rule that where a party alleges new matter merely inconsistent with the allegations on the other side & not forming an issue upon them, a traverse is necessary; does not hold where the party who alleges new matter inconsistent with the allegations on the other side takes the burden of proof upon himself. i.e. when he alleges some affirmative matter which he is bound to prove & bound to prove in the precise manner, in which he has laid it.

As in an action of debt, if the Defend. rely upon the fact of payment he must allege it specially & plead *in quo modo*, time, place, sum, & acceptance by the payee. All this he must do & all this he must prove.

Again, in a Bond given to a Judge of Probate, one condition is that the admin^r render an account. The payee alleges a breach that the Defend. has not rendered his account. The Defend. cannot plead that he has rendered his account, *abque hoc* that he did not render it. or that he has rendered his account, & conclude to the contrary. He must plead this specially leaving every thing open. Lamont 150 866 233.

Massachusetts.

But when a party merely contradicts & denies by mere matter what is alleged on the other side, a traverse is not necessary nor proper. It would amount to a redundancy. What he has alleged is not in point of fact inconsistent with what is alleged on the other side, & therefore a traverse is not necessary.

Thus suppose to an action on contract the Defend. pleads infancy. The p^lff. replies a promise after full age. The p^lff. cannot here traverse the plea of infancy, altho' hee that he was under age, for he has once admitted it. So then cases the new matter must conclude with a verification without a Traverse. 2 Mo2 168. 3 B. & C. 309. Cro. J. 221.

Again, the Defend. pleads a release of the cause of action. The p^lff. replies per fraudem, that it was obtained by fraud. He cannot traverse the fact that there was a release, for he has implicitly admitted it, by alleging it was obtained by fraud. Cro. J. 384. 2. Mo2 168.

When a formal traverse is made (as with an altho' hee) with a verification the issue is joined by the opposite party's affirming over what is thus traversed & concludes to the Country. As p^lff. replies that J. S. did seize in fee in manner & form as if, and of this he joins himself on the Country. A special traverse then leads to an issue by the opposite party's affirming over what is thus traversed the special traverse denies. Salk 4. 1 Inst. 128. Lamer 247.

Lord Coke lays down a rule on this subject, which is very badly expressed & which for a long time I could

Pleas and pleadings.

not understand. It is this. That an issue joined upon an abique hoc ought to have an affirmative after it. It means the abique hoc ought to have an affirmative after it. As J. P. did seize in tail "without this", that he did seize in fee. The meaning here is that the negative cannot be traversed with an abique hoc. The common rule of Traverse will not permit it. The words abique hoc are a strong negative & therefore to follow it with another negative would be to say, that J. P. did seize in tail, without this, that he did not not do. Seized in tail. - 1 Inst. 126. Staves 121.

And it never can be necessary or ever convenient. When the privilege ^{of traversing} negative with an abique hoc, the party is bound to allege & prove his new matter quo modo.

It has been a question whether the omission of a traverse when necessary is matter of substance or matter of form. The opinions are contradictory. I conceive for reasons given before that it is matter of form only, for if he has pleaded a sufficient inducement to a traverse, & has not concluded it with a traverse, he has always sufficient, & the defect cannot therefore be a defect in substance, but only in form. - 1 Leon. 434 (form) 2 Roll. 60 (substance) 4 Inst. 70.

If a Defend in traversing the peer's title, shows in his inducement a defective one in himself, a defective defence, his plea is bad. This is no other than an example under a general rule of pleading before laid down, that where a party shows himself no good defence, he cannot support it. This tends to an inducement to a traverse. Staves 118.

(*But by y. Stat. of Jeffords it is a fault in form, & cured by Spec. Rem. only.)

Pleas and pleadings.

It is a general rule that there cannot be a traverse upon a traverse. This rule is founded in reason & necessity. Lecture XVII.

By a traverse upon a traverse is meant, that when one of the parties has tendered a material traverse, the other party cannot leave it & tender one of his own to the same point; i.e. one of his own upon the inducement to the first Traverse. Hob. 104. 1 Inst. 282 b. 5 Com. 120. Rep. 101. Hutton 74.

By the same point is meant the same identical ground of claim or defence. I observed yesterday that when one party had tendered a material traverse the other was bound regularly to join in it. And this rule is, that the second shall join in the material traverse tendered & not tender a new one of his own to the same point.

Thus suppose Defend. pleads that S. T. did seize in fee; the Plff. replies that he did seize in tail *ut supra* hoc that he did seize in fee. This is proper. There is an inducement, viz. "that he did seize in tail". Now the rule is the Plff. must join in this traverse & not say that he ought to be barred without this that he did seize in tail. He cannot superadd an other traverse, by traversing the inducement to the first traverse. If he did he wd. superadd a traverse upon a traverse to the same point, for the traverse you see is only a conclusion from the matter of fact contained in the inducement & the only question is whether S. T. did seize in fee.

Again, the Defend. pleads usury to an obligation. The Plff. replies that it was made upon good & lawful consideration (stating that it was) without this, that it was true & there corruptly agreed to. Both the inducement &

Pleas and Pleadings.

One traverse relate to the same point, viz. that there is no usury, for if it was made upon good & lawful consideration, it was not corruptly agreed" and if it was not corruptly agreed "it was made upon good & lawful consideration". Now it is not competent for the Defe. to reply that it was corruptly agreed without this that it was made upon good & lawful consideration. We must join in the traverse, viz. that it was corruptly agreed & conclude to the Country. For if when one material traverse is allowed the other may abandon it, and if he may do it, so may his opponent & thus as the case may be, the pleadings w^o never be closed.

But a traverse after a traverse is good, even though the first traverse is material...

The distinction between a traverse after a traverse and a traverse upon a traverse is not easily understood by Students. But the distinction is important, well founded and absolutely necessary for the attainment of the great object of pleading.

A traverse upon a traverse is one which goes to the same point, i.e. the same precise ground of claim or defence as the traverse taken upon the other side does.

A traverse after a traverse is one which does not go to the same point or ground of defence. In point of time or order of pleading they may both be a traverse after a traverse, but the true distinction is as above.

Take the action of Trespass. If a man brings trespass for trespass committed, & lay it on a certain day, he may prove any trespass committed on a different day,

And as he can do this, the declaration covers all trespasses committed before the action brought. But a trespass committed on one day, is not a trespass committed on another day. Now if to this action of trespass the Defendant pleads a release of all trespasses committed before ^{a certain} day, he must traverse all trespasses committed after that day & before the date of the writ. The cure then is this. A. sues B. for a trespass committed on the 30th day of September. B. pleads a release for all trespasses committed before this time & traverses all since to the date of the writ. Now what can the plaintiff do? He may do one of two things according to the truth of the case. He may either deny the fact that he executed the release or he may admit the execution of the release & join in the traverse, i.e. that the Defendant is guilty since the release executed & conclude to the contrary. This is not a traverse upon a traverse, because the release pleaded & the traverse do not refer to the same thing, i.e. to the same trespass. The trespass released is one thing & the trespass traversed is another. This then is a traverse after a traverse, viz. one which does not go to the same grounds of defence, for when plaintiff denies the execution of the release and traverses the inducement to the Defendant's traverse, the release of the trespass being one thing & the traverse of the trespass another, his traverse is a traverse after a traverse. - Hob. 104.

Again A. sues B. in Trespass. B. pleads that on the 30th of August A. T. enfeoffed him, by virtue of which enfeoffment he entered upon the land. If he pleads no more.

Pleas and pleadings.

Traverse

his plea is bad, for the joinder does not cover the trespass committed before it was made. Now he should traverse all trespasses committed before the joinder was made. Suppose he should thus plead. The plff. may join in the traverse by replying that he is guilty in manner & form as he alleged &c. and conclude to the country; or he may traverse the fact of the joinder; for the trespass covered by the joinder is one thing & the trespass covered by the Defendts. traverse is another. Now if he traverses the joinder he traverses a class of trespasses different from those traversed by the Defendant. This then is a traverse after a traverse for it is not one going to the same ground of claim or defence as the other.

Again. The Plff. sues for a trespass committed on the 1st of September. The Defend. replies that he had a licence to enter on the 10th. day of September. Now he must traverse all trespasses committed before and after the licence, as the Plff. may prove any one committed before or after that time. The Plff. in reply to this plea may do one of three things. 1. Suppose the trespass was really committed before the 10th of Sept. If so he will join in the traverse by affirming that the trespass was committed before &c. and conclude to the Country. 2. If it was committed after this time, he will also join in the traverse that he is guilty after &c. and conclude the Country. 3. But suppose there was no licence given, he may then traverse the fact of a licence, and this will be a traverse after a traverse; for this traverse is not to the same point to which the Defd. has reference in his traverse. Hob. 104.

Pleas and pleadings.

Traverse.

Thus far of the distinction between a traverse after a traverse and a traverse upon a traverse.

I am yet to consider how far if a traverse upon a traverse cannot be allowed. Why should a traverse be superadded when the traverse taken goes to the whole ground of the defence or claim? and the law will never allow the parties to deviate from rules which necessity tends to a proper & regular issue.

To the rule that there cannot be a traverse upon a traverse there are two exceptions.

1. When the first traverse is upon an immaterial point, the other party may abandon it & tender a new traverse of his own which is on a material point, or he may demur to it for immateriality. This is proper because by the first traverse the point to be determined cannot be put in question & if the other party joins in it, the controversy cannot be decided.

2. If the plff. sh. declare in waste that the Def. full & sold his trees, & the Def. sh. plead that he full them for repairs & did so to save them, & sh. prove that he sold them. This is not a traverse of a material point, for if he did not sell them it does not follow that he is excused. The inducement to the traverse is material, and therefore the plff. may reply that he full them not if & sh. prove that he bestowed them in repairing the House. This is a traverse of the inducement, the first traverse, is a traverse upon a traverse of the same ground of defence. It goes to the same identical waste. The waste complained of & the waste.

James

justified is the same. The traverse in one case as well as in the other go to the same point. When he says he did not fill the trees, the trees are the same as those he is charged he bestowed in repairing the houses; and when he alleges that he bestowed them in repairing, &c. is equivalent, the same trees are traversed by the Def. Therefore it is clearly a traverse upon a traverse. 1 Anst. 282. b. East 114. Cro. 99. 1 W. Bl. 379. 406. 1 Sams 22. Nov. 33 p. 101. 760. 104

You will observe by the way, the Plff. in the case above supposed is not bound to tender a new traverse upon the former one, for he may demur to it, if he chooses. 1 Sams 21.

2. There is another exception. This obtains where in a Trespaff laid to have been committed in a certain county, as in C. where the action is tried, the Def. pleads a local justification that it was committed in another County to wit in B. with an aboque hoc. that he committed it in the County of C. The Plff. may abandon the traverse tendered the material & tender a traverse upon the point of justification. This is a traverse upon a traverse. The plff. is allowed to do this to discharge foreign pleas which are false & which tend to oust the jurisdiction of the Court in transitory actions. Now if Anst. 6. you are assailed & battery committed in the City of C. B. pleads that he was a Sheriff and by virtue of his office arrested the plff. in the County of B. without this that he was guilty of the ass. & bat. in the County of C. or on of the plff. is bound to join in this traverse, his injured, for the ass. & bat. may not have been committed in the County of C. He may then dissent the traverse.

take a traverse upon the inducement to the first, for if he is not according to the strict principles of the common law, the Defend^t forever defeat him by affirming, that if the trespass was committed, it was within a foreign jurisdiction, as without this liberty he must join in the traverse & surely be defeated. 4 Bac 73. Cro E. 99. 412. Cro C. 100; Rep. 101.

From these examples in Tresp^s you might be led to suppose that this mode of pleading is allowed in many cases where it is not allowed.

For it is a general rule that if the declar^t counts but one cause of action which in its nature is separable, so that the p^lff may recover for as much as he pleads, so that the plea in Bar will go to the same point as the declaration, the Defend^t cannot make that part of the plea which goes in answer to a part of the declaration an inducement to a traverse of the other, viz. the residue of the cause of action. This he can do in trespass, i.e. he pleads justification on one day & traverses the trespass said to be committed on another. So he makes that part of his plea which is an answer to some trespass is an inducement of a traverse to the other. This he cannot do, as I said above where the decl^t is in its nature so separable that a recovery may be had for part of the plea in Bar will go to the same point. 1 Saund 267. 1 Bulst 14. 4 Lev 225.

As for instance A sues B. in an action on the case on contract for 100£. B. has paid a part, 50£ but he has not paid all. He pleads that he has paid 50£ & the p^lff ought to be barred without this that he owed 100£. now this declaration extends only to one cause of action, but the plea

11th Nov 1792 25. Com. Di. 11th Nov 1792

Pleas and pleadings.

Traverse.

extends to different parts of the ground of action. You see here he pleads payment as to half & traverses the fact of owing 100 $\text{\$}$. This he cannot do, for the fact may be that he has not paid 50 $\text{\$}$, if he could plead as above, the other must necessarily join in the traverse & eventually lose 50 $\text{\$}$, for if he joins he cannot recover for the 100 $\text{\$}$ and if he denies payment of 50 $\text{\$}$ he admits that are but 50 $\text{\$}$ due.

The difference between the cases of trespass & this case is evident, for one act of trespass covers any one of a thousand which has been committed, but here is one entire cause of action. Well then how is the D^f to plead? He must plead that as to all but 50 $\text{\$}$ he never assumed & promised to pay & as to 50 $\text{\$}$ he has paid them.

Again an action of nuisance is brought. The p^lff. charges 2^d & 3^d with obstructing three of his ancient rights. The D^f denies to waive himself of an agreement with two & to deny an obstruction of the third. Now suppose he pleads a justification as to 2 & concludes with a traverse as to the third. This is ill. He cannot do it, for 2 may have obstructed the third right that no justification as to any. And if he D^f thus pleads the other party must necessarily join. He D^f pleads that as to all but two he is not guilty & puts his case upon the country, & as to the two he must plead his justification.

In 1 Saund. 285. there is an authority Lecture XVIII. referring to the 2 Saund 190. to the point that a wrong conclusion is matter of substance; at Com. Law. & it was on 17th years & still think that on principle it is only matter of form.

It is a general rule that the party to whom a traverse

is tendered does not admit by joining in it, the truth of the new matter alleged in the inducement; for he is obliged to join in a traverse well tendered except in the cases before specified. If the rule that were otherwise the party might always allege important matter in his inducement to the other party by being obliged to join in it & cannot admit it; and if he admitted it the system of pleading would become a system of chicanery & fraud to delude & perplex. The inducement cannot be proved & therefore the parties are at issue upon what has no connection with the inducement. 4 Bae 38 note.

A protestation however is sometimes used, ^{not} taken as a precaution to avoid the admission of the truth of the inducement to prevent the effect of the admission in a future controversy. A protestation is (a protestando) an exclusion of a conclusion. It is an oblique allegation. Com. Dig. Pleas &c. Davies 42. Co. Litt 126. 3 Bae 311. 2 T.R. 441.

But a protestando is no part of the pleadings, for it is not insisted for the ^{other} ^{when used}, consequently it requires no answer & cannot be traversed.

But the party tendering a traverse admits of course what he does not traverse, for he is at liberty to deny what he traverses. And nothing material can be on the record. It is not either denied or confessed. Hence it is a rule that the pleader sh^d. deny all that is necessary to destroy the other's right or his plea may be demurred to. Fulk 26. 4 Bae 2. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Yet he may prevent the admission of any allegation not traversed so far as it respects any future claim by a protestation.

Pleas and pleadings.

Traverse.

A protestation does not oblige the party ^{as} when it is used to prove the facts protested against. for he admits the facts as to the principal case. It only prevents the record from being used in any future case as to the matter to which the protestation extends.

Blackstone states this case. While tenure in villenage subsisted if a villen had brought an action ^{vs} his Lord, & the Lord was inclined to try the merits of the demand & at the same time to prevent any conclusion ^{vs} himself that he had waived his seignory, he could not in this case plead both affirmatively that the p^{er}son was his villen & also take issue upon the demand, for his plea w^{ould} then have been double, as the former alone w^{ould} have been a good bar to the action, but he might have acknowledged the villenage of the p^{er}son by way of protestation & then have denied the demand. By this means the future waifalage of the p^{er}son was saved, for the protestation prevented the conclusion which w^{ould} otherwise have resulted from the rest of the defence, that he had enfranchised the villen since no villen c^{ould} maintain a civil action ^{vs} his Lord. 3 Bl. 312. 2 Burr. 1023. 1 Inst. 126 Litt. Exp. Sec. 192.

A protestation also is the only mode of denying those allegations which cannot be put in issue. The inducement to a traverse cannot regularly be put in issue, & therefore can regularly be denied only by a protestation. Lums. 148. Flow. 276. C. upon de Plead. 26 & 27.

(But any repugnancy in the protestation does not vitiate the plea, because, strictly speaking, the protestation is not a part of the pleading. The plea is a distinct

Pleas and pleadings.

Traverse,

thing from the protestation. The form & mode of protestation shows that the two things are totally distinct, for the common mode of protestation is this "the Def (or Pl, &c.) protesting that such & such allegations are not true, for plea saith ye". The protestation then is the only way of denying what cannot be traversed. Lanc 14th.

A traverse can only be taken on a material point.

A "material point" is one which is decisive of the cause of action. If the traverse is taken on an immaterial point the issue is of course immaterial & the merits of the controversy cannot be decided. Therefore a traverse taken upon an immaterial point is demurrable, i.e. is the subject of a special demurrer. Lanc 118. 6 Co 24. Com b. 321. 2 Lanc 5. 28. 1 Lanc 14. note. 2 Lanc 207^{b.c.} 2 Str 817.

This defect at Com. Law was the subject of a general demurrer. But by the Stat. of Chan (Statute) the defect is cured & can be taken advantage of only by special demurrer, ^{per 145th with reason}

A traverse must not only be taken on a material point, but on an issuable point. Every material point is not issuable. True every material fact may in evidence be denied & in that sense it is issuable, but it is not every material point that can be denied by plea. Cro E. 201. 4 Bac 68. 81. 1 Lanc 22. 3. 3 Med 320. How 231. 2 H. Bl 122.

Thus in Assumpsit, the plff says "in consideration whereof if the Def assumed & promised". This is not sufficient and that the consideration can be traversed. 2 Str 607. 2 Key 410.

Matter of Law, however material can never be traversed, & yet matter of Law is often inserted in the pleadings.

Plas and pleadings.

traverse,

pleadings. According to the general rule matter of inducement cannot be traversed. True there are exceptions as has been stated. Matter of aggravation as a general rule cannot be traversed for whatever covers the gist of the action covers all matters of aggravation. Yet in instances they may both be denied Leon v. Pla. 2. 9. 14. Lewis 4. 118. 11. 8. 8. Hob. 103. Hard. 2. 2. 7. 68

Again. Every traverse must be taken on a single point i.e. upon a single ground of claim or defence. If it extends to more than a single point it is multifarious, i.e. double & is therefore a defect in form. Duplicity vitiates any pleading because it tends to unnecessary prolixity & duplicity in a traverse is as much fault as in any other plea.

To make a good traverse, that which is traversed must be decisive of the cause of action - and traversing more than this is clearly improper.

But it does not follow from this, that it must be taken on a single fact, as one ground of defence may include a vast number of facts. Thus in a plea of usury, as many facts may be set forth as the nature of the agreement will admit of. Now the p. off. may traverse any one or all these facts & still there will be but one single ground of defence. Yet if the Defend. sh^d. plead to an action on a contract, a release & infancy the p. off. ought to demur for duplicity, but he c^d. not traverse both in his replication. Talk 628. Hob. 103. 1 Bur 320. 8 Co 66. 134 880. B. & P. 93.

Again. A ground of defence may consist of many dependant facts by destroying one of which you destroy the whole defence. - As suppose the Defend. pleads an accident

Pleas and pleadings.

Traverse

and satisfaction. He must plead both because they both go to constitute one good defence. Now the p^{ty}. when he comes to traverse (if he traverses at all, cannot traverse both the accord & satisfaction, because if he traverses one & supports it he destroys the whole defence.

If the two points are material either of them may be traversed, but the party ought not to deny both, unless a denial of both is necessary. Lewis 48.6 Co 24. 11 Wils 338.

Another general rule is that nothing except what is alleged can be traversed, for the definition of a traverse is a denial on one side of what is alleged on the other. Consequently nothing can be traversed except what is alleged or necessarily implied. If an allegation is necessarily implied it may be traversed. Thus it is said that in a foot-mint, living of Susan is necessarily implied. this therefore may be traversed. 4 Bac. 68. 15. 81. Park 298. 629. Earth 99. La. Ray. 64. 2 Vent. 77. Gen. phod. 913. 92.

Thus suppose an action to be brought upon a parole promise, which is within the Stat. of Frauds and Perjuries. The p^{ty}. declares upon this promise without stating whether it is in writing or not. The Defens. cannot plead that the p^{ty}. ought to be barred, without this, that it is in writing, because it is not alleged to be in writing by the P^{ty}. in his Declaration. He should plead this defence specially, & conclude with a verification. But in this case both traverses will lie on the part of the Defens. only by Stat. 4 Geo. 2. c. 28. s. 1. Ray 232. 1. 11 Wils 338.

This is a general rule, but under some further rules which are hereafter to be considered you will find this rule wants some qualification.

Now suppose a bond is given conditional to pay,

Pleas and pleadings.

Traverse.

money at or before a certain day. The Def.^s pleads pay-
ment before that day & no more. Now if issue is taken
upon that allegation as it stands & if found for the p^lff.
it is an immaterial issue; for altho it not have been
found to have been paid before the day, it may have
been paid at the day (True if found for the Def.^s it se-
tles the controversy,) therefore the p^lff. may traverse the
fact, that it was paid before, at or after the day,
or yet this is traversing what is not alleged.

I think therefore it may safely be laid down as
a general rule, tho I find it no where express in the books,
that where traversing only what is alleged may leave the
issue immaterial, then it is competent & proper for the
other party to make his traverse broader than the alle-
gations, i.e. traverse what is not alleged, so that it may
lead to a material issue. 2 Burr 944. 2 Wils. 173.

A traverse of what is not alleged is ill on spe-
cial demurrer only. It is bad only in form, because the
party pleads by way of traverse what he ought to plead
by way of special matter. The only objection is the ma-
terial matter was pleaded informally. 3 Salk. 938
1566. L. Ray. 238.

And every material fact appearing in the
pleadings may be traversed, altho it be matter of sug-
gestion or inducement. True matter of inducement as
a general rule cannot be traversed, & the instances are
very rare in which it is traversed, & the reason is be-
cause matter of inducement is seldom material, yet it
may be material & then may be traversed.

Pleas and pleadings.

Traverse

As where the plea is an action of slander, so
Laws that "whereas he took an oath before the Mayor
of London, & the Defend. said 'you are false sworn.' There
is an inducement, but it is this inducement which
gives the plea his right of action & therefore the Court
said it might be traversed. Bro C. 169. Lams 4. d. 20. 208.

I have observed under a former division of this
subject that every plea must be broad enough to
cover the whole gravamen, or cause of action. It
follows from this rule that when a party justifies
or confesses & avoids only a part of the allegations on
the other side, his traverse must be coextensive with
the residue or part not avoided.

As if in Trespass, a Defend. pleads a release.
He must traverse that he is guilty since the release
& before the date of the writ. The release extends only
to Trespases committed before the date of the release.
Now his traverse must be coextensive with the part
not avoided & that part is all Trespases committed
since the release & before the date of the writ. Hob.
104. C3p. 4. 10. Park 222. Bro C. 87.

So if in Trespass the Defend. should plead a justi-
fication, as this justifies only for all Trespases since, he
must traverse all Trespases antecedent to the justi-
fication, in order to cover the whole gravamen. 12 Ed.
293. 4. 2. Wood. 103.

I observed that if the Defendant pleads a
justification at a particular time, he must traverse
his liability at any other time.

Next come pleadings.

Traverse,

There is however an exception to this rule. Where the justification is laid on the same day on which the trespass is laid to have been committed, there the day is agreed upon by the parties and the trespass justified or the trespass complained of are identified. It is *prima facie* a good plea & covers the whole year even without any additional traverse. The opinions are not all agreed as to this point, but the position seems to be established.

But suppose the p^l has laid the trespass on a wrong day (and this he may do) and the Defend. pleads a release on that day, & the p^l has really sued for a trespass committed on another day, which the Defend. really committed, what can the p^l do? The p^l must make a *novel assignement* in his replication, viz. that the trespass for which he actually sues, and of which he complains were committed on such a day. 2 Tann. 42. 3 Talt. 42. 11 B. 138. 1 Bay. 86. (S. & P. 17. B. & P. 17. C. 165. 514. 15. 3 B. 311.)

Traversing before & after the day on which the justification is laid is not necessary, if the Defend. avers that the acts which he justifies are the same with those complained of. This is our common practice in Court. As if a trespass a licence on a particular day sh^d. be pleaded. & it comes out he must traverse it as an accident & subsequent trespasses. But by the rules of our practice he is not required to do this if he will aver in his plea that the trespasses complained of are justified are one and the same, according to the latter authorities. This practice is now approved of by 1 B. 138. 2 B. 138. 2 B. 138. 2 B. 138. 2 B. 138.

Pleas and pleadings.

Traverse,

in the English Courts, although there are different opinions upon the subject in the Books. 1 Buls. 138. Salk 64. Comp. 161. 3. Lev. 277. 1 Tawnd 142²⁹⁹. 2 Do. Salk. Contra. 1 Vent 184. 2 Kel. 278. 5 Bac 207.

But suppose the trasp. is which is justified & alleged to be the same complained of is not in fact true? Then the p.p. is to traverse that they are ~~not~~ the same. Nor is to deny that allegation - this brings the parties to a proper issue.

With regard to traverses, there has been much speculation with regard to the proper office of an inducement. It is said that it is entirely negatory, & it is asked why it is necessary when the other party is bound to join in it if ^{the traversee & inducement go to the same point.} it will be denied? Why does he not negate at once without introducing an inducement with an alibi hoc?

1. In the first place an inducement when used by way of protestation answers a very necessary & proper purpose, as has been before explained.

2. When the inducement & the traverse go to different grounds of defence, the inducement is a necessary part of the defence, for the defence is incomplete without it.

3. The great ^{inducement to a} use of traverse is to prevent a negative pregnant. Mr. Lawes says a special traverse without an inducement is a negative pregnant. This is generally true. Whether it will or will not work a negative pregnant depends upon the particularity of the allegations traversed.

Suppose that to a plea of usury stating that

Pleas and pleadings.

Thames,

it was corruptly agreed that 10 per cent. should be reserved, The plaintiff replies without an inducement merely that 10 per cent. was not reserved. This leaves the case open to an implication that 10 per cent. was reserved, which would be usury. Now he may state that the contract was made upon good & careful consideration, without this, that it was corruptly agreed & that the inducement prevents the negative pregnant.

When the allegation is simple so that a denial of it on its terms will lead to an implication then there can be no negative pregnant, and an inducement on that account may not be necessary. As where D. pleads that his ^{1st} Defendant is dead. Pl.^{1st} replies that he is not dead. There can be no implication. L. 118.

It is another rule of pleading that the inducement to a traverse must consist of issuable matter. The question is asked why is there a necessity for this when the inducement is not in general issuable. The rule is founded upon this ground, that an inducement to a traverse is generally necessary, and if it is necessary it must be pertinent & proper, & it cannot be pertinent & proper unless it consists of issuable matter, for as the traverse must be on an issuable point, & as the traverse is nothing but a conclusion from a matter of fact specially stated, the inducement, the inducement must therefore consist of issuable matter. So in the case of a traverse after a traverse it is necessary;

Traverses and pleadings.

Traverse,

for the traverse is a necessary & material part of the defence, & if so it must consist of issuable matter, & it does not relate to the point of defence.

Generally a traverse on a direct denial pursues the terms of the allegations. But this mode is not always right. It will sometimes lead to a negative pregnant. Thus where an action on the case is brought for obstructing three ancient rights. If the Def. sh^d traverse on the terms of the allegation that he has not obstructed three rights, it w^d be a neg. pregnant for he may have obstructed two, & if so the action may be supported. 1 Saund 288. 9 1 Inst. 126, 303. 3 Bac 301. 1 Lord 360. 356 2 Br 194. Complut. 25

So also in a case before a court. To an act. of debt or oblig. payable at or before a cert. day, the Defend. pleads paid before a cert. day. The plff. can't traverse in these words that he did not pay before, for the issue then w^d be immaterial, & it is clearly a neg. pregnant. The sh^d traverse before, at or after the day. 2 Bar 944. 4 Bac 66. 2 Will 173.

To that then you are to traverse all the allegations in the words of the ass^{ts} laid & when not, depends upon the criticism, & thus traversing w^d occasion a neg. preg. The traverse is not to pursue the terms of the allegation.

The traverse is generally followed with these words "more or less". These words are in general matter of form, altho the plea may be so constructed as to make them matter of substance. Prima facie they are not necessary traversing without these words is good. 2 Saund 120.

Pleading a negative pregnant is bad only on special demurrer. It is ill in form only. 4 Bac 93. 1 Lord 187. 312.

Duplicity

Pleadings and pleas.

Duplicity.

Of Duplicity.

Duplicity is a fault in all pleading, and yet tho it is laid down as a general rule, that is a fault in all except dilatory pleas, yet from what I have said before on that point, you will observe it is a fault in any plea. *Inst. 303. 304. 4. B. c. 118. Nov. 194*

A double plea is one which consists of several distinct & independent matters alleged to the same point, and requiring different answers. By the same point is meant the same precise ground of claim or defence. *Inst. 304. 305. 1. St. 142. 1. St. 140.*

Thus, if to an action of covenant the Defend. sh^d. plead Infancy & a release, or Infancy & fraud, or infancy & duress or any two distinct defences to the same cause of action, his plea w^d be double. This w^d be alledging two distinct matters by way of defence which require distinct answers. As if he pleads infancy & a release. The allegation of infancy w^d require one answer, & the allegation of a release another. The allegation of infancy might require the replication of necessity or a promise after full age. The allegation of a release might require the replication of non est. factum.

But giving different, i.e. distinct answers to different parts of a declaration or different parts of a plea, does not constitute duplicity. One part of a declaration may be true & another false. Consequently the party ought to admit what may be true & avow it, & deny what is not true. To one part of a declaration may be sufficient & another not sufficient, therefore the party ought to have an opportunity to deny that part which is sufficient & to answer to the other. Thus the Defend. may plead the general issue

Pleas and pleadings.

Duplicity.

to one part, plead some special matter in avoidance of another, & demur to a third. So that giving distinct answers to distinct parts of a declaration, a plea does not cause duplicity. 1 Inst. 304. 4 Bac. 118. 119. Lawes 101. 2. 3

So also at Com. Law if there are several Defends. each one may plead for himself as if he was sole Defend. This to be sure may often introduce complexity in trials, yet it w^d be unreasonable for the rule to be otherwise, for if each c^d not plead himself without the concurrence of the other, it w^d be placing each at the mercy of the other. There w^d be perpetual room for collusion between one Defend. & the plff. Pleading then as above is not duplicity. Hob. 70. 2 Stra 1140. 610. Lawes 132. 2d. Ray? 1372.

The reason why duplicity is a fault in pleading is that it tends to unnecessary prolixity in pleading, to confusion, and where costs are taxed according to the length of the record (as they are in Eng.) it tends to great vexation. And it is never strictly necessary that a Def^t. sh^d. make two distinct defences, or a plff. to make two distinct answers to one plea. Neither party ought to plead any thing except what will in Law avail him, & if one defence will answer this purpose he ought not to plead more. True there may be a difficulty in selecting one of two defences when only one can be pleaded. This is remedied by Stat in Eng. which is to be considered. Flow? 194. 10me 478. Yelv. 13.

I have observed what Duplicity is, & the reason why it vitiate every plea.

I would now observe by way of general rule that every plea, must be some one entire, connected & confirmed by the Supplement y.

to one single point, i.e. one single ground of claim or defence.
3. 1st. 311.

This rule in some of its branches is rather didactic than imperative, for a plea is not demurrable, because it is not simple; nor because it is not connected with logical accuracy; but it is true that every plea must be entire, & confined to one single point. By this is meant that the plea must be single; it must not be double. Nothing more is meant. These words point out the necessity of unity in a plea of nothing more.

By this rule you will not understand that every plea must be confined to one single fact; for a number of facts oftentimes constitute one entire ground of action or defence. These facts however must all go to one ground of defence. As of a Defend, pleads an accord & satisfaction and a release both to one action. At Com. Law his plea w^d be bsd as being double. There are two distinct grounds of defence. But if he pleads accord & satisfaction merely he must state the agreement, i.e. that it was accorded & agreed that he should give such an article at such a place, & that the plff sh^d accept it, and then he must aver he did deliver such an article at such a place, & that the plff accepted it. Here a number of facts & altho they are all stated (as they ought to be) yet the plea is not double.

Again. Here is a plea in Bar of an award of arbitration. Here the plea includes a great number of facts, the submission, the meeting of the arbitrators, the award &c. - If any condition precedent was necessary to have been performed on the part of the party pleading, he must

Pleas and pleadings.

Duplicity.

state it & over performance. . . when all these facts are necessary, but so the plea cannot be double. 11 Wm. 320. 2 Wm. 1028.

But it is to be observed that distinct counts in one declaration, tending to establish one cause of action, or several distinct causes of action, do not make the declaration double provided each count is single in itself. The mere adding distinct counts in one declaration does not make the declaration double. True, if each count is double, the declaration is double.

A count is the narration of the facts which constitute the cause of action or ground of complaint. It is sometimes called an exposition of the writ.

When there are several distinct complaints or causes of action inserted in one record each one of them is called a count and all of them taken together constitute the declaration. But the insertion of several counts in one declaration does not amount to duplicity, if of any of the counts contain several distinct & independent matters requiring different answers, it may be demurred to for duplicity. 1 T. R. 374. 8 B. & C. 333. 1 L. R. 101 or 106. 3 B. & C. 295.

Different counts inserted in one declaration which require different judgments wholly vitiate the declaration, so that judgment may be arrested for the cause.

The reason why a party inserts distinct counts in one declaration, is to enable the party to succeed in one if his evidence is not chance to support another. They are inserted out of abundant caution. They do not amount to duplicity. 3 B. & C. 205. 1 L. R. 101 or 106. 3 B. & C. 295.

Pleas and pleadings...

Duplicity;

Now does surplusage ever constitute duplicity. Thus if a Defend pleads two distinct matters by way of defence & one is entirely frivolous and not issuable, the plea is not double.

It is not however to be understood that the plea is not double because one of the defences pleaded is not sufficient in law. It must be frivolous, altogether impertinent, and not issuable. Thus when a party pleads a release & did not aver that it was by deed, and pleads another defence, the plea was held a double, because although the part of the defence was insufficient in itself, yet it was issuable & not frivolous. 1 Sid. 175. 1 Keb. 161. or 661.

Duplicity in a declaration consists in joining distinct causes of action, which cannot be joined, as contract and tort, to enforce one right of recovery. As if a p^lff^d declare upon a contract which the Defend. has failed to perform according to the conditions, & allege that the defend. had combined to defraud him, by reason of which he had failed to perform the contract, this would be a double declaration, because the action is tort to recover for the non performance of a contract, but tort is joined. There is said to be fraud. Cro C. 14. 20. 1 Vent. 365. 2 Com 198. Com. Pleas C. 39.

So in declaring on a Bond the assigning of more than one breach in the replication (which is by the p^lff^d) is duplicity at common law. It is wholly unnecessary in this action to assign more than one breach, because one breach works a total forfeiture of the whole penalty. It is then improper for the p^lff^d to allege any more. 4 B. & C. 134. Lams 256. 2 Vent 198. 2 Wils 267. Com. Pleas C. 33. 3 B. & C. 108

Pleas and pleadings.

Duplicity.

nor incorporate distinct defences in one plea.

But by Stat. 4. and 5. Aron the Defens with leave of the Court may plead as many different defences as he pleases, to one cause of action. And this leave of the Ct. is matter of course. This Stat. was introduced to remedy the difficulty & embarrassments which arose from choosing one of several defences, which he may have had. 4 Bac 121. 1017 3 187 308

We have no such Stat. nor any such practice in Conn. Yet in Conn. there is not the same necessity for this Stat. as in Eng. for two reasons --

First, we are not obliged to plead specially in many cases where an English pleader would be obliged to

Second. In this State, the Defend. is allowed a new trial for mispleading. This is not the case in Eng. Yet it is? he will if we had such a Statute.

This English Stat. comprehends no other than pleas to the Declaration. It does not authorize the Def. to give two replications to one plea in Bar, nor the Defend. to give two rejoinders to one replication. There may be, it is true, as many replications as pleas, & as many rejoinders as replications. 4 Bac 121. Com. Dig. Pleader, 2.2

Duplicity however is a defect in form only and no advantage can be taken of it except by special demurrer. The objection is not that the plea wants matter but that there is a redundancy of it. And this special demurrer must point out the particular on which the plea is double, or as Lord Holt says the pleader must lay his finger on it. 4 Bac 22. Salk 259. 678. 1 Id. Remy? 332. 798. 1 Wils. 2. 19. 2 Bac 184. 18 and 337. Com. Dig. Pleader 238. 2. 2. 3. 4. Supplement 3. This --

Pleas and pleadings.

of profert & oyer.

This last rule that duplicity is only matter of form does not apply to cases where the ple^r joins in one declaration distinct causes of actions, which according to the rules of pleading cannot be joined, as distinct substantive grounds of recovery. As if he declares in one count in writ on Bond & in another in this writ. Here the Declaration is radically defective. It is bad on general Demurrer, it is bad on a writ of error & is a ground for a motion in arrest. This is a misjoinder of actions & is much worse than duplicity. It is bad because the two counts in the declaration require different judgments. It destroys the distinction between a misericordia and a capiatum. Reg. 233. Talk 10. 3 Linc. 97. Lomb. 333. 12 Rep. 274. Thus far of Duplicity.

Of making profert & having Oyer.

The subject of profert and oyer is to be considered. It is a general rule of the Court that when either party declares or pleads a deed and claims title under it, he must make profert of it, i.e. he must plead it with a profert in curia. Com. Dig. Ple. 3. 3 Bl. app. 22.

These words are derived from the form of making the profert, i.e. he avers that he produces writings the contents of.

When profert is made that the adverse party may have Oyer a copy of it and that the Ct. may inspect it. The word Oyer means hearing. The object then is that the party may hear it read & the pleader have a copy of it and that the Court may inspect it. 10 Co. 93. Hob. 233. Linc. 96. 6 Co. 38. Com. Dig. Pleader P.

the

Pleas and pleadings.

Profect & oyer.

The adverse party is then entitled to offer more not plead, without it, until it is shown to him, but if he does plead without making a demand, he is barred and can never again claim it. 3 Falk. 119. 6 C. 283.

But in S. B. Profect is never made of a Bill of Exchange or Promissory note, because they are not deeds. An action on a Bill of Exchange is generally assumpsit, and the instrument is only evidence of the promise made in the declaration. Chitty 105. B. 243.

But in Comm. Profect is always made of a promissory note, because we consider it as a deed, and declare upon it as such. We regard it as a Specialty. In the State of New York it has become frequent to seal promissory notes to make them deeds. Our Cts. consider the sealing as nothing, and if they are in writing, they are deeds.

On this subject of pleading with a Profect some distinctions are to be observed. -

It is a rule that if a right actually acquired by deed will pass without deed, he who claims the right is not obliged to plead the deed even if he has it, & if he is not bound to plead it, he is not bound to make profect of it.

Yet in all cases where the right can not be acquired without deed, he who claims the right must plead the deed & make profect of it. As in indentures of Apprenticeship, a release, a devise of Land. These cannot be but by deed, consequently the deed must be pleaded with a profect. 5 Co. 13th But. 11 But. 119. Cro. C. 143. 3 T. Rip. 156. 1 Tan. 3rd

But when the right will pass without deed, if the party pleads the deed & makes title under it, he must make

Plaint and Pleasings.

profit. 10 Co. 94.

before of it, as in the assignment of a lease. If he pleads his assignment by deed & makes title under it, he must make profit of it. 2 Med. 610. Same 97.

But when he pleads a deed if he does not make title under it, he is not bound to make profit of it. 6 Co. 38.

A stranger to a deed may plead it. § Section XX.
without making profit of it. The reason is, it is not in his power to do it. He may indeed compel the other to bring it into Ct. by a Subpoena duces tecum. 10 Co. 94. 3. Lev. 83. How. 147. 18 Co. 374. 2 How. 418. 1 Sand 92.

And a person who acquires title by operation of law from another who claimed title, is not bound to make profit of it. Thus if a Tenant in Dower brings an action agt. the Heir, she need not make a profit, for she is not supposed to have it in her Dower. 5 Co. 75. Inst. 225. 1 Ark 205.

But to the general rule last laid down there is an exception in the case of a Tenant by the Curtesy, the wife claiming it under a deed, she must plead the deed with a profit, because the husband is supposed to have possession of the wife's deed & may retain them. In the case of a Tenancy in Dower the wife is not supposed to have possession of the husband's deeds. They go to the heir at Law. - 6 Co. 126. 10 Co. 94. 4 Bac 110. 5 Co. 70.

A Record may be pleaded without making profit of it, because the Law requires that a record sh^d. be kept in some certain public place for the convenience of those who may wish to resort to it. And even a record of the same Ct. in which the plea is made, need not be pleaded with a profit, but it is said that in Eng. the party must point out the

Wills and pleadings.

proper ways.

number of the roll that the other party may easily find it. 1 Inst 225. B. N. P. 252. Sams 47. 2 Mos 237.

But the a stranger to a deed may plead it without a profer, yet privies to a deed must plead it with a profer, i.e. those who are in legal privity with the persons to whom the deed was given, must plead with a profer, when the original parties are bound. that a plea.

As when the heir at Law claims under a deed made to his ancestor, he must plead it with a profer, because the deed goes to the heir at Law. 1 Inst. 207. 317. 10 Co 92. 94

So also when a man limits over an estate to A. with remainder to B. the remainder man must plead it with a profer, because as the instrument serves to the advantage of both, each may have it. 10 Co 92. 94.

The rule that the heir at Law must plead with a profer when he claims title by descent to his ancestor, does not hold in this State. Under the Law of some the real estate of the person deceased descends to all his heirs. Now suppose there are 10 children & one wishes to sue after partition is made. He may not have the deed, for he is no more entitled to it than either of the remaining nine.

Believe he is not ever bound to produce it in evidence. according to our practice, the particular heir who sues may produce a copy from the Town record. In Eng. these reasons do not apply. The eldest son is heir. The deed then goes to him & he can certainly produce it. So a profer is necessary in Law. the heir would not be obliged to produce it. This however is more matter of speculation.

If a deed is lost by time or accident or destroyed

Hearings and Pleadings.

Prof. Mayer.

by, was usually (not by force) it may be pleaded with a proper.

So long as the sea is in the possession of the air navigation
company, it may be pleads without a protest, altho it belongs to
the party pleading the sea a right to do.

Yet this pleading will be bad at Common Law & even now
as he is in England, unless the party thus pleading without proof
states the reasons for omitting the proof. He will be disman-
tled. He must allege that it has been lost by casualty,
by time & accident, so that it is in the possession of the ad-
verse party. He cannot omit the proof without cause.
And he cannot in this situation plead with proof be-
cause he will be concluded by it. He has stated on the
record that he has it in his possession. No evidence will be admit-
ted to show that he has it not in his possession. 5 Geo. 2. c. 6.
75^a 1 Wils. 16. Plac. 130. 3 N. H. 151 or 157. (Tamm's notes 2 H. 3. c. 25.)

You may see the same point decided in our own
 Courts. 1 Wood 541. 2 N. D. 482.

If however in such a case the party pleads with a propriety, the adverse party is entitled to open, & as the plea is not taken, the party pleading the defect cannot proceed.

But the pleadings may be an end, by the party's ^{consent}
voluntarily signing the reason.. I saw y. records 16. Feb. 1850.

And what the deed is only in answerment to the claim
or defence, proper is not necessary, because by the suppo-
sition title is not made void. 3 T. R. 573. 10 Co. 42. 6 Co. 38.

But it has been long since settled in Con. that a paper is not necessary & that over is as demandable without it as with it. as when in Eng. it is necessary to bring with paper, so that over may be demanded, in Con. over is demandable without it. - 1100. 566.

Plas are pleadings.

Proper v. v.

At Com. Law where proper is necessary to be made, the omission of it is a defect in substance, not cured by verdict. In dec. at Com. Law almost every defect was matter of substance.

(But now by the stat. 16 and 17. Car. II. and 4 & 5 Ann. (the two great Statutes of Joinders) the omission of a proper when necessary is reduced to mere matter of form, and no advantage can be taken of it except by special demurrer. It is a rule, therefore a defect in form, yet it is aided by a verdict by the "opposite party" and even by general demurrer. Hook. 301. lora. Jac. 32. 4 Bac 113. lora Eliz. 217.

In Hutton 54. it is said that it is but only on special demurrer even at C. L. The opinions are the other way.

But suppose a deed to be lost or destroyed, & the party to plead it with a proper, how is the party's pleading to be proved? How is he to show it? In such a case it is an established rule that a sworn copy or even parol evidence of its contents is admissible.

But it must first be made to appear probable to the Court, that it is lost or destroyed. Merely alleging it lost will not answer to lay a foundation to introduce this evidence.

Therefore it is a general rule, that where a party alleges that he has lost a deed, he is not allowed to introduce this secondary evidence, until he makes it appear probable to the Ct. that such was the fact. In few cases positive evidence that the deed was lost can be found, therefore the law allows probable evidence of the fact. It may be rendered probable in a variety of ways, as proving that his house has been burned, with his papers in it. This is very strong evidence. 1 Atk 445. Ch. 17, 205. 6. 10. 22. 2. 29. 30. 1. 345. 7. 1. 65. 2. 1. 70. 1. 32. 32.

Pleas and pleadings.

Spencer's case.

The same evidence is also admissible where the deed is in the hands of the adverse party.*

Yet here another rule is laid down, viz. that notice must be given to the adverse party by the pleader to produce it, and if he does not give this notice, he cannot prove the deed by a sworn copy, and a fortiori he cannot by produce evidence - and of the party who has the deed will not produce it, the other party may introduce this secondary evidence. Chancery will compel the party to produce it. 1 Esp. R. 50. Chitty 506. Parker's case. 165.

The object of the proffer is to enable the adverse party to have sight of it - When therefore proffer is made, the adverse party is entitled to sight, i.e. as the word imports to hear it read. 4 Bac 113.

But he is entitled to something more than to hear it read. He is entitled to a copy of it at his own expense. Merely to have it read might answer a very inadequate purpose. Hob. 217. 4 Bac 113.

But sight is not demandable of a record, even where the party makes proffer of it, because altho he has it, yet in judgment of law he has no right to it or control over it. 1 Saunders 187. 12 Rep. 147.

But if a deed is pleaded with proffer when proffer is not necessary, & the other party makes title under it, the other party may demand sight of it.

And if a deed is pleaded with proffer when proffer is not necessary, the opposite party cannot claim sight of it. As in the case of a deed pleaded by way of inducement. The party does not make title under it.

Spencer's case.

Pleas and pleadings.

Proferat Oyer.

Oyer is demandable so that the party may have the instrument and that he may make answer to it, i.e. so that he may plead better to what is allayed on the other side. Now where a person does not derive title under a deed, altho he makes proferat of it, Oyer is ^{not} demandable because it cannot enable him to plead any better. Proferat is such a case as where, ^{see 29} plus age. ^{see 29} Salk 447. ^{see 29} Will 395. Oyer 476. 7. ^{see 29} Pains 97.

Granting Oyer, where it is not demandable is not error. Error is not predicable of it, for it can do neither hurt nor good.

On the other hand the refusing of Oyer by the Ct. where by law it ought to be granted is error, for it is depriving the party of a privilege to which he is by law entitled. ^{see 29} Salk 447. ^{see 29} Pains 97.

When Oyer is granted, the party obtaining it, may enter it at length verbatim upon the record & take advantage of any condition omitted by the party pleading, i.e. any thing which on the face of it operates on his favor.

As in an action brought on a Penal Bond with a condition. The party may put this Bond with the condition on the record & show that he has performed the condition; for if the condition should never appear, the obligor might recover the whole penalty; and after reciting the condition the Oyer may then performance.

Yet in many cases the party obtaining Oyer will have nothing more to do than to spread it upon the record and demand it, because there may be a variance between the instrument produced on Oyer & the instrument declared upon. And therefore whenever there is such a material variance as would work a nonsuit, then the party obtaining Oyer may spread the instrument on the record, and demand ^{to 5} it. ^{to 5} Mod 23. ^{to 5} Laws 26. 4. 2. ^{to 5} H. 299.

(See Supplement 66.)

Heads and Pluckings.

Prolet Payer.

As where A. declares in an action of Covenant for 100 L.^s B pleads aver by the instrument is found to be one where the condition is only 50 L. 10s. may spread this upon the record and demur to it.

If the instrument declared upon is insufficient in law to support a claim or defence, or appears on the face of it to be illegal it may be spread upon the record and removed to. But if the insufficiency or illegality does not appear on the face of it, then the party must show the fact by an averment. He cannot with safety be removed to. . . Vol. 11 342. sawes 99.

Thus suppose an action is brought upon a penal Bond, in the condition of which it appears that the consideration for which it was given was illegal (as for a Bribe); - Here as the illegality appears upon the face of the condition, it may be shown upon the record and dismissed.

But if A gives a single bill for an illegal con- sideration and it does not appear on the face of it, the party must show the illegality by plea. He cannot demur.

If the party obtaining your misrecites the deed, the adverse party may sign judgment, as you want of a plea, or he may procure it to be enrolled on his side in his replication and then demur. He may thus sign judgment, because the party praying your reciting the instrument, implicitly promises to recite it truly. It is a breach of trust of an implied engagement &c. must. at.

Pleas and pleadings.

Departure

to his right of action. He avers performance. The Defend. pleads that he has not performed one condition. The plff. replies that he was ready to perform it and that the Defend. refused to accept performance. This is a departure. He sh. have plead this fact as it was.

If the matter first alledged is alledged at al. Com. Law, or subsequent plea supporting it by special custom is a departure. As when the plff. brings an action at al. Com Law on an indenture of apprenticeship. Defend. pleads infancy (which at l. E. is a good defence) the plff. replies, Custom of London, by which minors may bind themselves by indenture. This is a departure. He should have bot his action on the custom. 12 W. 81. 1 Keble 361. 469. 512.

A plea asserting a right at Com. Law is not fortified by a plea showing a Statute right. Thus where a Trespass for taking the plffs. beasts, the Defend. pleads taking them damage feasant. The plff. replies driving them out of the County. This was holden to be a departure, because at Com Law driving them out of the County did make the defendant a trespasser. He is made so by virtue of the Stat. 50 Hen. III. and Phil. and Mary. 3. Lev. 48.

But if one party claims under a Stat. & the other party pleads a repeal of it, the first party may justify his first plea by alledging that the Stat. is revived by a subsequent act & it will be no departure. 4 Bac 123. 1 Lev. 81.

But where the cause of action is alledged generally in the declaration & the Defend. pleads what is called an evasive plea, i.e. answers the cause of action as it appears on the declaration, answers it truly, a new

Issues and pleadings.

Departure.

assignment of the cause of action is not a departure, a novel assignment may to be sure be so made as to work a departure, but a novel assignment, varying the statement in the declaration so as to bring the true cause of action up, is not of course a departure.

Thus if in *Trespass*, *Plff.* pleads a trespass on a certain day & the *Defend.* justifies for that day, the *plff.* may make a novel assignment, i.e. he may allege that the trespasses complained of were committed on another day, & that they are not the trespasses justified. This is no departure because the day is not material. 3 Will. 20. 1 *Laws* 28. note. (S. M. P. 17th ¹⁸⁴ *Laws* 164 or 144 & 23 B. 311. *Laws* 240. for an e.g.

Departure is a substantial fault or pleading, and is reached by general Demurrer. It is said in one place by *Sergeant Williams* in his notes to *Founders* that it is ill on special demurrer only, yet he corrected it afterwards, for it was an error. 1 *Laws* 217. 2 *Ibid.* 84. *Salk.* 221. 2. *Str.* 422.

Although a departure is a substantial defect it is aided by verdict. In *Conn.* it has been decided by the Supreme Court and affirmed by the Supreme Court of Errors that this defect was not aided by a verdict. *Bay.* 22. 85. 94. *Conn.* C. 165 or 288. *Dec.* 110

When an issue is joined on an immaterial fact and the Court cannot know from the verdict for whom to render judgment, a replender will be awarded. *T. Bay.* 450. *Salk.* 178. 579.

Demurrer

Pleas and pleadings...

Demurrer.

allegations admitted to, for all pleadings contain a syl-
logism in substance...

A demurrer may be taken to any part of the plea-
dings, i.e. to specific matters alleged in any part of the plea-
dings. & not that it may be taken to any time, as often
in error is joined. Co. Litt. 72^a 5 Mod 132.

I have observed that a demurrer admits such
matters of fact alleged on the other side as one well plea-
des. but it admits no other facts than such as are
well pleaded...

If then in an action of covenant broken the p^{er}ff. al-
leges some breaches well & some ill, a demurrer to the
whole declaration admits those breaches only as an issue,
a p^{er}jur. & the p^{er}ff. must have judgment for them on l^y.
1 Wils 243. Holt 191. Salk 218. 2 Tames 279. Hob. 36. 232. 1 Dan 338.

Under this general rule it follows also, that a
demurrer never admits an averment which contra-
dicts what before appeared certain on the record. But
an averment is always bad. If he pleads a fact impos-
sible it can have no legal operation in his
favor. Indeed this is good cause of Demurrer. 3 Burr 124.
Cro C. 25 or 35. 2 Tames 168.

Thus when one pleads a record & afterwards contra-
dicts the record, a demurrer did not admit it.

Upon the same principles it is that a demurrer
never admits what appears on the face of the plea-
dings to be impossible. An instance of this occurs where
in an action of replevin, charging the breast to have

been

Pleas and pleadings.

Demurrers.

been taken into one parish & county and the other party avowed taking them in another parish & county, and then avowed that one county was within ^{the} another. This was held to be impossible, & that a demurrer did not admit it. 1 Tidd. 10. Com. Di. Plea. 2. 6.

Again - A demurrer does not admit facts avowed which it appears on the record cannot be ^{legally} proved. It is to no purpose that one party makes averments which in Law he cannot prove.

Thus if one should plead a release of a Bond, by Parol, or a release without avowing it to be by deed a demurrer would not admit it, because a parol release can't be proved at Law. 2 Wils. 376. 6 Co. 44. Cro. 254. Lams 28. ^{year 1921.}

Again - A demurrer does not confess allegations which are ^{important} not material nor traversable. Such allegations cannot be denied. They cannot be traversed; and a party taking a demurrer ought never to be considered as admitting what he could not have traversed. If he was, this consequence w^d follow, that a party w^d be obliged under certain circumstances to confess allegations which he chose to or not. Salk 561. Lams 168.

A Demurrer never admits the truth of important or immaterial averments. These are not traversable and therefore a demurrer does not confess them. A demurrer will generally confess those allegations only, which may be denied by the opposite party. 4 Bac. 131. Salk 561.

Again, a demurrer never admits mere conclusions of Law made by the adverse party from facts

Pleas and pleadings.

Memoranda.

stated. Allegations of facts are the only proper subjects of demurrer. It is impossible to demur upon a conclusion of Law.

Thus in a plea of justification, it is usual for the Defor. after stating the facts which form his justification to conclude "proux bene licuit", "as by the Law he might", or "as by Law he had a right to do". And a demurrer to this plea does not admit this conclusion of Law, for if so a party by drawing a false conclusion of Law would prevent the other party from demurring. Hob. 56.

With these qualifications a demurrer admits such facts as are well pleaded.

After an issue is joined a demurrer cannot be taken. As long as the pleadings are open a demurrer can be taken. Com. Dig. Pleas, D. 606. ab. 1. 1 Phos. 213.

A demurrer is generally called an issue in Law. But is not so strictly considered. It is rather treated as an issue than forms one, because the issue is not joined until the joinder in demurrer is made. 3 Bl. 313. 14. 10. 1 Inst. 71. 126. 4 Bac. 129. 54. or 514.

If there is a demurrer and an issue in fact in the same pleadings, the demurrer is regularly to be tried first, that the jury may assess the whole damages for the whole cause at once.

Thus in covenant broken, the Defor. traverses one breach & demurs to the other. The demurrer is tried first, that the jury may assess damages upon both breaches; but if the issue in fact were tried first, the jury could assess damages for that only, & damages must

Pleas and pleadings.

Demurrer.

is allowed to be offered on the demurrer. This is a rule of convenience and is entirely discretionary with the Court, for they may have either triest first. 1 Anst. 79. 2 125. 3 Palm. 57. 4 Bac. 130.

And if when one party is demurred to it is found for the plaintiff he may enter a non pros. as to the issue in fact. I have this 20 years ago only on the demurrer. Salk. 219. 1 Anst. 574. 4 Bac. 130 & 30. In fact see 3100 app. 23. 1 Anst. 243. 4.

It is a rule that there cannot be a demurrer to a demurrer. A demurrer is not an allegation of new matter. It is therefore absurd to demur to it.

It is said however by Lord Holt, that there may be a demurrer to a demurrer when a plea is a statement. is not opposite. This I cannot understand. The demurrer certainly raises the only question of Law which can be raised by demurring. Com. 6. 306. Salk. 219. 1 Ba. Reg. 20.

And as a demurrer cannot be demurred to it follows that when one party demurs the other party must join. You cannot traverse it, or plead specially to it, because there is no fact alleged in it. Com. 6. 306.

The form of a demurrer in our country is an abridges one. The Defend. says the Pliffs declaration of matters therein contained are insufficient in the Law as a ground he prays judgment, & then the Pliffs joins & says his Declaration is sufficient. &c.

As to the effect or consequence of a demurrer.

It is a rule in civil cases that judge upon a demurrer, excepting a demurrer to a dilatory plea is peremptory, i.e. final judgment on chief. It is not a judgment. (the rule applies to civil cases.)

of

Massachusetts pleadings.

Demurrer

respondens ouster. when the p^{ss} recovers it is quod recuperavit, when Defnd. rat. sine die. 10th 306. 10th 69. 341.

And the rule in criminal cases short of felony is the same at Com. Law. If a party is indicted for any offence short of felony & he demurs to the indictment, and judgment goes against him it is a judgment in chief. 2 Hawk 334. 11 Coe 60. Cro Eliz 196. 4 B & C 334. 335.

But in prosecutions for felony or any other capital offence, the better opinion is that the party may plead over after his demurrer is overruled. Ld. Holt has laid down the rule differently in one part of his work and in another part, as I have laid it down. 4 Bla 334. 338. 2 Hawk 334. 2 Hale 239. 257. 225. 315. 243.

If a Defnd. demurs to the declaration and concludes with a plea in abatement, still the p^{ss} may join in Bar, as the expression is, in the demurrer as tho he did not conclude in abatement, & have judgment in chief as the declaration is admitted. 2 Ann 172. 3 Lev 223.

Demurrers are either General or Special.

Demurrers are of two kinds. 1st General. 2^d Special. Section XVII.

The difference between a general and a special demurrer consists in this. A general demurrer assigns no special cause of demurrer. A special demurrer is one which specially points out the cause of demurrer, or the defect on which it is founded. Thus if the Defnd. merely says, "the p^{ss}'s declaration & matters therein contained are insufficient in the law" and concludes with praying judgment, this is a general demurrer. But if he demurs

Plea and Pleadings.

Demurrer.

in this way "the plffs. declaration &c. are insufficient & for cause assigns that the plff. has not laid when & where the cause of action arose," this is a special demurrer. The want of a venue constitutes the insufficiency and is specially assigned for cause. *1 Inst. 232. 2072. Lams 167. 4 Bac 132.*

It is said by Lams 167. that special Demurrers were introduced by the Stat. 27. Eliz. But he is certainly incorrect. They were not introduced by this Stat. for they were known before the Stat. was made. This Stat. makes special demurrers necessary where ant. C. L. a general demurrer would have answered the same purpose, i.e. where the defect intended to be reached by the demurrer is a formal defect, it is to be a special demurrer. *4 Bac 132. Hob. 232. Lams 337. 14 Inst 240.*

But to constitute a special demurrer it is not sufficient that a cause of demurrer be assigned. It must be specially assigned, i.e. assigned with particularity. The assigning of a cause of demurrer if generally assigned does not make a special demurrer. Thus if Dift. says the plff's declaration is insufficient for cause specially assigns, because it is uncertain & wants form, this is a general demurrer, because he has not assigned the particulars in which it wants form. He should have specially assigned the uncertainty, as that it wants a venue &c. *1 Inst. 232. 2072. Lams 337. 14 Inst 240.*

I observed that the opinion of Mr. Lams was clearly incorrect. The fact is all demurrers were anciently special. And says Lord Coke, there was anciently no such thing as a general demurrer and he was eminent, is his proposition at the time of the Stat. 27. Eliz. He says it is a good

Pleas and Pleadings.

Demurrers.

rule to make them special in all cases, because it is safe I suppose to mean, as there may be great doubt at times whether it is a defect in form or in substance. 2 Bulst. 267. 10 W. 240.

A special Demurrer, it is to be observed, reaches all defects which a general Demurrer does, and others which a general Demurrer does not. And for the purpose of discovering the precise difference between the effect of the two, observe this rule—

All substantial, i.e. material defects are reached as well by a general as a special demurrer. But defects in form can be attacked only by special demurrer under the Stat. 27 Eliz. — If therefore one demurs specially & assigns a special and particular cause of demurrer, if this defect really exists, his demurrer will reach it, and this demurrer does not reach this defect pointed out, yet if the pleading is substantially bad, his demurrer will be good. Saich. 185. 7 Rob. 127. ²¹⁸⁴ 127. 128. 624. 3. Bla. 315. 1960 38. 1 Inst. 72. Com. pleading 5. 6.

This is a rule introduced by the Stat. 27 Eliz.* and it obtains throughout the Union. Our Cts. have adopted the reason & spirit of that Stat. as Com. Law.

There is a farther Stat. on this subject, viz. 4 & 5 Ann. which has extended the necessity of demurring specially farther than the Stat. 27 Eliz. The Stat. 27 Eliz. introduced the general rule, that no advantage should be taken of defects in form except by special demurrer. The Stat. of Ann. extends the general rule to certain particular defects expressly named in it and not supposed to be within the Stat. of Eliz. 4 Wac 133. 4. 136.

It is proper to observe that in all pleadings two
(H. Dec. Supplement. d. d.)

Heads and pleadings.

Demurrer.

things are necessary. 1st. That the matter pleaded be sufficient, 2d. That this matter be alleged according to the form of Law. The omission of either of these requisites is good cause of demurrer. The omission of the first is good cause of general demurrer. The omission of the latter is the subject of a special demurrer. 1 Inst. 353. 4 Bac 2. Hob. 164. ²³² 2 Lea. Kay? 793. 802.

But what is substance and what is form? This is often a difficult question. They are not subjects of any very particular definition. It must be left to the judgment of the pleader.

The most definite rule is this. The omission of that without which the very right does not ~~exist~~ ^{can} ~~can~~ ^{can} be had produces that which gives him a right of action or defence is defect in substance. On the other hand, the omission of that without which the very right does appear, but which is not alleged according to the forms of Law is a defect in form. Here the defect does not consist in the omission of any thing which is the gist of the action or defence. Hob. 232. -

As for instance of a defect in substance. Suppose the plffs. right of action is to accrue by the performance of a condition precedent & he omits to aver performance. This is a defect in substance, because by the supposition the very right does not exist, unless he has performed that which gives him a right of action. -

Again - suppose a count which seizes in the Exting. is necessary to subject him. In the declaration the seizure is omitted. This is a defect in substance. The seizure goes to the ground or gist of the action. The omission of the seizure causes the very right not to appear.

Pleas and Pleadings.

Summers.

But suppose A sues B. in assault & Battery but omits to lay the place where it was committed. This is clearly mere matter of form, because it is immaterial where B. inflicted the battery, if he did inflict it. The mere right of recovery appears. The action is transitory and the form of Law requires that a venue should be laid. But it is only required as matter of form.

Again. Suppose a declaration is double to enforce one right of action. As if contract and Tort are combined by the p^lff. together. What is the nature of this defect? It is clearly a defect in form. The p^lff. has shown enough, indeed the defect is that he has shown too much. The right of recovery appears on the declaration. Again — Defend. pleads specially what amounts to the gen. issue. This is a defect in form only because he pleads what is sufficient, he only pleads it informally. It results from what I have before observed, that where there is a local want of substance (as where A sues B. for incivility, or where a material allegation is omitted (as if p^lff. in Trover does not allege property, or in Trespass possession) a general demurrer is proper. — Hob. 133, 198, 232, 301. Carth 389. 12 Price 184. Stra 624. 1 Inst 72.

If one party pleads a plea which upon the face of the proceedings he appears to be stopped from pleading, it is idle or general demurrer because it appears that he has no right to plead in any form what he does plead. Lawes 170. Willy 13.

I have observed that no advantage can be taken of formal defects, except by special demurrer. I would further observe that a special demurrer reaches no other formal defects, except those specially assigned as cause.

Pleas and pleadings.

Demurrer.

of demurrer, for as to all defects not specially assigned, the demurrer is a general demurrer. The assigning a formal defect specially as cause of demurrer does not enable the party to take advantage of any other formal defect under his demurrer. 10 Co. 88. He maintains however all defects in substance.

I would here observe that if on demurrer to the declaration judgment is given for the Defend. no similar or concurrent action for the same cause can afterwards be sustained on the same grounds as are disclosed in the first declaration. The plff. cannot bring another declaration like his first. 6 Mod. 20. Cro. 8. 35. 55. 5. Ray. 2. 477. 2. 1. 109.

But when the plff. fails for want of an essential allegation, he may maintain another action and bring a second declaration in which the allegations may be inserted. The grounds disclosed in the second are not then disclosed in the first, tho the cause of action is the same. And this is a rule which justice & common sense requires. In the first case the legal merits have once been decided, in the other, the legal merits of the second declaration have never been tried. So if the plff. misconceives his action, as if he bring trespass for trespass, and the declaration is ill on demurrer, he may bring a second action in trover, because then two actions are neither similar nor concurrent. 6 Co. 7. 3 Mod. 240. 304. 2 Bl. R. 779. 831. 827.

There are a number of distinctions to be observed how far a recovery in one action shall be a bar to a second. These do not fall properly under this title, and will not now be considered.

One word however farther. Tho the declaration is

Pleas and pleadings.

Demurrers.

bad through mistake in the pleadings, yet if the Defendant takes no advantage of the mistake, but pleads something in Bar or which the plff. takes issue, and the right of the matter is found for the Defend. the plff. shall have no other action.

Suppose the plff. in Trover state a demand & refusal but omits to lay a conversion. His declaration is bad and it is demurred to. He may maintain a second action in setting the conversion. But suppose the Defend. instead of demurring pleads a release & the plff. takes issue upon it, & judgment is for the Defend. the plff. is barred from a second action. He has failed upon a plea which shows conclusively that he has no right of action whatever for the cause assigned. 6 Mo. 207. Shaw. 120. or Skinner 120.

A Demurrer should always extend to the whole of the pleadings on the other side unless a part of that pleading is answered in some other way. This follows from the general rule, that the pleading on one side must be co-extensive with what is alleged on the other, otherwise the pleading is bad. 1 Sid. 400. Di. Plea. E. 1. Law 171.

It is to be observed that a demurrer and indeed any thing that raises an issue in Law reaches thro the whole record & attaches itself upon the first substantial defect in the pleadings. It is usually said it attaches itself upon the first defect. This is incorrect.

So if the parties join upon the replication the Court must give judgment upon the whole record. Suppose the declaration insufficient, the plea in Bar insufficient, & the Demurrer judgment must be given for the Defend. for a bad plea.

Pleas and pleadings

Demurrer (1)

plea is good or not for a bad declaration. Suppose declaration good, the plea in Bar bad, the replication bad & Def. demurs to the replication. Now the question formally raised is whether the replication is sufficient? but judgment must be rendered against the Defend. for the plea in Bar, and a bad replication is good enough for a bad plea, in Bar.

But if the plea in Bar were bad only in form, and a bad replication and a demurrer, judgment w. go against the plff. because by the replication he has waived all advantage to be derived from an informal plea in Bar. Hob. 56. 199. 9 Co 110. 3 Co 52. Salk 514. Bon pleading 7. 3 Sir 244. 8 Co 120.

But there is a class of exceptions to this rule. The objection obtains in cases of debt on Bonds for performance of covenants, and assumpsit. In declaring on a Bond if the Defend. pleads an insufficient bar and the plff. in his replication assigns no sufficient breach & Defend demurs. He shall have judgment. See here the first defect in point of form is on the part of the Defend. - The reason is in debt on Bond the cause of action never appears until the replication. For the replication is merely a supplement to the declaration; as soon as the Defend puts the condition up on the record the whole contract appears, & then the cause of action appears in the replication. 3 Co 52. 8 Co 120. 29th 133th L. Ray 1080. 13 Co 221. And where there are several pleas in Bar to an Obed. as under y^e Stat. of Ann there may be, any one wh. goes to the whole. Such is demurrer to y^e first sufficient, y^e rest w. be rendered for Def. tho the others are good & not here. For altho all y^e defenses are joined & his first one, still this is sufficient, & it appears from y^e whole, since that plff. ought to be barred by judgment rendered for Def. 2 Bar. 744. 1 Salk 80.

Measure pleadings.

Demurrer to Evidence.

This is a proceeding of much nicety, though it is a strictly rational one.

In certain cases where the point in issue is an issue in fact, one party may take the examination of the cause from the jury to the Court by demurring to the evidence which the adverse party exhibits in support of his issue. I say in certain cases, i.e. when a proper foundation is laid for it. And this demurrer is always to be taken before the party demurring exhibits any evidence of his own. 11 May 1804. 1 Inst 72. B. & P. 312. 1 Root 570. Allyn 18.

It is to be observed that the relevancy of the evidence, i.e. whether it conduces at all to form the issue, its applicability, pertinency is also matter of Law to be determined by the Court. Its relevancy being ascertained, the question how far it conduces to prove the issue or fact to be ascertained, is matter of fact to be determined by the jury, for it is a maxim of Law that judges are to determine questions of Law, and juries questions of fact. Doug 380. 2 H. Bc. 205.

It never can be proper thus to demur to evidence which is clearly relevant to the whole issue however weak it may be. and evidence is always relevant to any issue which it conduces in any degree to prove the issue.

The Demurrer in this case puts an end to the question of fact, and refers to the Court the application of the Law to the question of fact shown in evidence. Of course the demurrer admits the existence of the facts shown in evidence by the person who demurred on, & like other demurrers denies their legal operation in his favor, i.e. their pertinency to support the issue. 1 Inst 72. 2 H. Bc. 205. b.

Pleas and pleadings.

Demurrer to Evidence.

In the nature of the thing, therefore, the fact must be first ascertained, because until this is done, the question of law cannot possibly arise. Matters of Law is in conclusion from matters of fact. If there were no facts existing, there could be no Law existing; & the principle of Law can admit of no application except to facts. The question is whether the evidence is pertinent to support the issue, but this evidence must first be shown. 2 H. Bla. 205-6.

Section XIII.

A Demurrer to evidence, is never taken until, issue in fact is joined & evidence is offered in support of that issue. And here Iw^o observe the difference between a demurrer to evidence, and a Demurrer to the pleadings. The latter, as the very words import is taken to allegations adduced on the other side & can never be taken after an issue is joined. The former is never taken to any allegations nor to any part of the pleadings and is always taken to the evidence after the issue is joined.

When the whole evidence exhibited on one side is written it may be always demurred to by the other, and the party exhibiting the evidence must join in the Demurrer or waive the evidence.

Thus if the p^lff. in Ejectments exhibits a deed as the evidence of his title, or if in debt he p^lo. a deed a covenant under seal as evidence of the debt, or when in general any instrument is adduced in support of an issue it may be demurred to. 5 Co 104. 3 Bl. C. 372. 12 Mod 570. B. N. P. 213. 12 Mod 106.

But whether a party exhibiting parol evidence demurred to is obliged to join in the demurrer is not fully settled in the old authorities, but now the principles seems well settled. The old opinions are contradictory. In Bro C. it is said he is not

Pleas and Pleadings.

Demurrer to Evidence,

obliges to join, because parol evidence is uncertain, & therefore ought not to be demurred to. Bro C. 151. 2. 5 Co 104. 1 Lev. 87. 1 S. 74.

As to this question the five following rules are to be observed.

1. It is clearly settled that in such cases both parties may agree that the evidence shall be demurred to, because there is no room for the objection of uncertainty. Bro C. 75 2.

2. It is fully settled that if one party introduces parol evidence to prove every definite fact, the adverse party by admitting the fact absolutely on the record, may demur to the evidence & oblige the other party to join in the demurrer or waive the evidence.

Thus suppose in an action of Trover the plff. offers evidence of a negligent keeping to prove a conversion. Now if the Defend. will admit the fact that the goods were lost by such negligent keeping he may demur. And in every case where the evidence is introduced to prove any definite fact, the other party by admitting the truth of that fact on the record may demur to it. If this fact is the very fact in issue it w^d. be ridiculous to demur to it but he may. Allyn v. D. 2 R. B. C. 201.

3. It seems to be now settled, though formerly doubted, that if parol evidence exhibited in support of an issue is certain, i. e. clear, distinct, & explicit, the adverse party by confessing the evidence to be true, may demur to it & compel the other party to join in the demurrer, or waive the evidence, for confessing that evidence to be true, which is direct & explicit is clearly a confession of the fact itself. But confessing the evidence to be true as given in by the party will not always oblige the other party to demur 2 R. B. C. 206.

Pleas and Pleadings.

Demurrers to Evidence.

4. If the evidence produced is loose & indeterminate the adverse party cannot demur to it, without settling on the record the fact which it tends to prove. But by making such admission on the record he may demur to it, whether the evidence is written or parol. Loose & indeterminate evidence is not explained by any example or by much reasoning. By it however is clearly to cast something contradictory & inconsistent from that which is certain. I suppose it is such as the witness himself is not certain about, such as he does not positively declare. As when the witness says "I am pretty positive" - "such was my impression at the time" &c. If the evidence in this form were demurred to it w^d be impossible for the Court to make any inference at all. The jury to be sure might infer that the fact really existed as the witness believes it did, but the Court cannot make such an inference. And if the evidence were thus demurred to, the party demurring, w^d deprive the other party of the privilege of having his evidence weighed by the jury. The fact must first be determined before there can be a demurrer, but when the evidence is thus loose, there is no fact ascertained. The party demurring must therefore admit the fact which the evidence adduced tends to prove.

Take the example in *Trover*. The p^ly wished to show that the property was lost by the negligence of the Def^d. & thus that there was a conversion. But by the way, negligence does not prove a conversion, but this is a question of Law to be determined by the C^t. Suppose then a witness says he saw this property or he believes it was in such an exposed situation. Demurring to this would not be demurring to the

Pleas and Pleadings.

Demurrer to Evidence.

the fact that the property was in this situation. But the party may admit the fact & then demur and therefore unless he admits this fact, the other party is not obliged to join in the Demurrer. Indeed he ought not, because it is a question of fact. *Scott* 104, 2, *H. Bl.* 207. *D. N. P.* 313.

5. There is another species of evidence different from those named, viz circumstantial evidence. And here the rule is this. If the evidence is circumstantial, the party must admit every fact & every conclusion, which the evidence conduces to prove, i.e. every thing which the Jury might infer from it, and then he may demur to it. Now if the party might demur to it without the conclusion and inference, he might forever prevent a party from proving a fact by circumstantial evidence, and the Ct. are never judges of inferences from facts. Circumstantial evidence is most frequent in Criminal Cases. - *Day or Doug* 114. 127. *Bul. N. P.* 313.

Circumstantial evidence is that which proves facts, which facts themselves conduce to the proof of other facts. Then are the rules applicable to parole evidence and the two latter to written also. *Fels* 22. 34. *Ally* 18. 2 *H. Bl.* 207.

Unless these admissions are made in the cases where they are necessary it is incompetent for the party to demur & of course the other party is not compellable to join.

For observe it is a rule that where it is competent for one party to demur to evidence it is the duty of the other to join in the demurrer.

(But suppose the party demurring does not make the admissions which are required, & the other party actually joins in the demurrer. the Ct. can render no judgment, because

Pleas and pleadings.

Demurrer to Evidence.

because the demurrer refers to the Court, the truth & weight as well as the relevancy of the evidence. This is to make known of the Court, but the Ct. can make no inferences from fact whatever. The proceedings then are altogether fruitless, & the course then, in this case is to award a "venire de novo". (B. N. P. 313. & Bac 137. 2 H. Bl. 209.)

Our Sup. Ct. in 1787 decided that in a demurrer to evidence before a single magistrate the party producing the evidence cannot be obliged to join in the demurrer. The reason given was an improper one - it was this - that a demurrer to evidence before a single magistrate w^d tend to entangle his proceedings. This is a proper subject for Legislative consideration, but a Ct. have nothing to do with it. If the party has a right to demur, the right is strictly juris and the Ct. cannot interfere to prevent the use of this right on account of political considerations. Hibby 352.

The same Ct. shortly after, decided that the party was not obliged to join in a demurrer to evidence if the evidence was almost all written and all admitted. The decision I cannot understand, unless they intended to establish a rule that there w^d be no case for a demurrer to evidence in this State, so that there can be no such demurrer unless the evidence is all written. I suppose the latter was their intention. 2 Swift 257.

The point in issue upon a demurrer to evidence is this. Is the evidence sufficient to maintain the issue. It is here to be observed however, that the whole evidence exhibited is to be demurred to and not any fractional part.

Pleas and Pleadings.

Demurrer to Evidence.

fractional part, for the question is not merely whether it is relevant, but whether it is relevant & sufficient.

And as the question is whether the evidence is sufficient in Law to maintain the issue, it follows that no advantage can be taken of such a demurrer of any defect in the pleadings.

Still after the demurrer is overruled or otherwise determined advantage can be taken of any ^{substantial} defect in the pleadings by a motion or arrest of judgment.)

Lord Mansfield says that advantage is then taken in arrest of judgment as it is after verdict. On principle I sh^d. doubt whether it did after a general verdict. I think it will be decided on the same principle as after a special verdict, a judgment by default, or nil dicat. From a general verdict after ^{cur} ~~cur~~ defect, for such general verdict supplies by necessary implication facts omitted in the pleadings, because it is presumed the Jury on the direction of the Ct. w^d. not have given such a verdict unless they had found those facts. But in the case of a demurrer to evidence the whole facts are on the record and are seen by the Court, consequently there can be no such presumption. Doug. 213. B. & A. P. 313.

It seems questionable whether in Com. advantage must be taken of any defect in the pleadings upon a demurrer to the evidence, by motion or arrest, as one must not do this when an issue in fact is referred to the Ct. This demurrer to evidence is tried by the Ct. It is a substitute for the trial by the Jury. 2 Swift 258. That idea has been exploded in 4 B. & A. 258, see Swift 258.

The party whose evidence is demurred to may always den as a judge of the Ct. whether he is bound to join in the demurrer, if there is no colourable reason for the demurrer they will not compel him to join to procure

Pleas and Pleadings.

Demurrer to Evidence.

a delay of justice, or frivolous pretences. *11 H. 2. Rot. 10. 117. B. N. P. 314. 4 Bar. 136.*

On demurrer to evidence a joinder in in the demurrer the usual course is to dismiss the jury immediately. And then the writ of enquiry to assess damages (if necessary) is afterwards executed, because the operation of a demurrer is to take the trial of the cause from the jury, to the Ct. *14 3. L. Ray. 60. Sa. Ch. 284. B. N. P. 314. Plou. 410.*

Sometimes however the jury assess Dam^s provisionally, before the demurrer is determined as the demurr^r is determin^d. So are the Dam^s. *Doug. 212.*

According to our practice there is no writ of enquiry. The jury are immediately dismissed & the dam^s are assessed by the Ct. *11 Rot. 570. 2 Swift 258.*

But if improper evidence being objected to is admitted by the Judge it cannot afterwards be demurred to. To demur in such a case w^o be to call in question by a demurrer an interlocutory judgment of the Ct. Besides it w^o refer to the Ct. a questⁿ of Law, it had once determined. The proper remedy in such case is by a Bill of Exceptions. *Sa. Ch. 284. B. N. P. 314.*

And if a party offering to demur to evidence is overruled by the Ct. his remedy is likewise by a bill of exceptions. *9 Co. 13^b. Cro. Ch. 249. 349. 10 N. P. 314.*

The whole proceeding in a Demurrer to evidence is under the direction of the Ct. to determine what admissions the party shall make. *21 Rot. 10. 117. 126. B. 208.*

The mode of demurring to evidence is this the party demurring must first state the evidence upon the record. He then alleges that this evidence is not sufficient in Law to maintain the issue and concludes with praying judgment, that for want of sufficient matter shown in that behalf in evidence, the jury may be discharged from giving a verdict. The Defend. who he demurs concludes by praying judgment that the jury may be discharged and that the p^lff. and that the p^lff. may be barred of having his action. *12 H. 15 C. 200. 2 H. 15 C. 200.*

Miscellaneous pleadings

Motions in Arrest.

Section XIV.

To arrest the judgment is to stop or stay it, in other words to prevent its being rendered. And this is done on motion reduced to writing and entered on the record. By this is not meant that there can be no arrest of judgment without a motion, for the Ct. if they think proper, in many cases may "ex officio" arrest the judgment.

This motion is in most cases made after an issue is tried & a verdict found. Few motions in arrest are made until after a verdict found. This however is not universally the case, for the judgment may be arrested after a default, or after a demurrer to evidence has been overruled. If there is any good cause for arresting judgment a motion may be made in arrest after default for it was not necessary for the party to plead. 3 Bl. 386, 393. 2 Stra. 1271. Doug. 2080, 2081, 213. 2 Burr 904

According to the English practice judgment is arrested for intrinsic causes only, i.e. such causes as appear on the face of the record. Causes extrinsic are to be taken advantage of by filing a Bill of exceptions to some interlocutory judgment of the Court, or in some other ways. Where the declaration differs from the writ as if the writ sounds in contract and the declaration in tort, here judgment must be arrested whatever the proceedings may have been, because the writ will not authorize the Court to take notice of such a declaration. The J. has no right to frame such a declaration because he was not authorized by the writ. 3 Bl. 393.

So also when the verdict differs materially from the issue, judgment must be arrested, for when this is the case the issue is not found either way. There can no such

Pleas and pleadings. (Motions in arrest.)

thing as an issue found where there is a material difference between the verdict & the issue, and where there is no issue found there can be no judgment. The judge follows from an application, ^{of the} ~~of the~~ facts, but there are no facts found, consequently there can be no judgment.

Thus suppose in *Slender*, the plff. alleges that the Defend. charges him being a Merchant, with being a Bankrupt. The Jury finds that he said he will be a Bankrupt. This verdict is materially different from the issue. If the Jury had expressly negated the issue between the parties found as they did, it w^d have been good. 3 Bla. 393.

So if the plff. Declaration is altogether insufficient, & he has obtained a verdict judgment will be arrested, because he shows no right of action. A verdict can find only the truth of the facts contained in the declaration. But on the supposition, the facts do not disclose a right of recovery, consequently the Court cannot ^{give} judgment. 3. Bla 393.

So on the other hand, if the Defend^t's plea on which he has obtained a verdict disclose no legal defence to the action judgment may be arrested by the plff. Thus in an action of Debt, the Defend. pleads "not guilty" and the issue is found in his favor. The finding proves nothing material in the case - finding that he is not guilty is not finding that he is not indebted. So if he pleads that he has always been ready to pay, & that the plff. has never called upon him to pay. In the same manner may be arrested after a verdict in his favor. Cro. E. 778. 3 Bla. 393.

The only difficulty under this head, is the application of the general rule to particular cases. It is an arduous task

Measure pleadings

Motions in arrest

to explain the subject. by laying down the general rule in various forms.

The material enquiry here is, for what kinds of defects in the pleadings, judgment may be arrested.

It is a general, may universal rule, that after verdict judgment may be arrested for any cause which after verdict judgment may be assigned for error. This rule is of much consequence because if you find in a particular case, a defect which may be assigned for error after verdict & judgment, you are certain it may be made the ground of a motion in arrest. The question still arises what defects in the pleadings after judgment & verdict may be assigned for error? 2. Roll. 716. Page 97. & Com. 174.

It is a general rule that if the statement of the pl^{ff}'s title, or cause of action (& that only) is defective, the declaration is aided by the verdict, altho it w^{ld} be ill on general demurrer. But, if his title, or cause of action appears itself to be defective, it is not aided by verdict. Russell on insipiente Don 253.

Suppose in an action of trespass, the pl^{ff} charges the trespass all well except that he does not lay a day certain in which it was committed. The question is whether this omission is aided by verdict? It is settled that it is because as it appears that the Defens. has done an unlawful act by which the pl^{ff} is damaged, he is entitled to a recovery. The defect lies in the statement of the title, & not in the title itself. 3 B & 394. Com. 377. Com. 389.

But suppose in Trespass for taking away his goods the pl^{ff} states neither possession of nor property in the goods and a verdict is found for the pl^{ff}. Is this aided by a

Warrantable pleadings.

(Motions in Arrest.)

verdict? solemnly not, because the Court cannot know that the defect is in the statement. Suppose the Defend. did take away a certain horse of the value of 100*l*. as laid in the declaration. Was it the property of the p^lff. or was it in his possession? It does not appear & the Court cannot presume it. Of course the Ct. cannot know that any right of the p^lff. has been violated. Here then there is a defect in p^lff's title.

Again. An action of Slander is brought against the Defend. for saying of the p^lff. "you are a Jew." A verdict is found for the p^lff. Is the Defect cured by the verdict? Clearly not, for the deflection does not go to the statement of the cause of action, but to the cause of action, for the words are not actionable & therefore there is no ground of action. Doug. 458, 1 Sid. 184. Cowp. 825. Salk 363. R. L. N. 7320. 2 Atk. 1023.

Again. Suppose that in an action vs. the Indorser of a Bill of Exchange, the p^lff. does not allege in his declaration, that he has given notice of non payment by the drawee. This is essential to the p^lff's right of action. Now is this defect cured by a verdict? No. His title appears defective. At any rate, it cannot be presumed that the fact of having given notice existed and the want of it, is a want of title as appears in his declaration.

The same distinctions applicable to the declaration of the p^lff. apply to the defence pleaded by the Defend. If the statement of the defence of the Defend. only is defective, a verdict will cure it. But if the defence itself is defective a verdict will not aid him.

Thus if in an action of Debt the Defend. pleads "not indebted" and yet still is found for him, this is a defect in the defence.

Pleasures, Pleadings.

(Motions in Arrest. }

defence itself. But suppose he pleads accord & satisfaction &
omits to state the day on which it was made and accepted,
and a verdict is found for him, the defect is no ground for a
motion in arrest, because the jury have found that there re-
ally has been an accord & satisfaction. See *Supra*, also *Bro E. 778*
Bro C. 497, *4 D. R. 472*, *10 Mo 292*, *10 T. R. 545*, *3 Binn. 1728*, *70 T. R. 578*, *Salk 130*, *365*, *Bul 323*.

Another general & universal rule is, that any defect in the pleadings which w^d. support a motion in arrest of judgment, must be such as w^d. ^{support a} be fatal on your Demurrer.

But this rule does not hold & converse, for it is by no means a rule that whatever will support a general disclaimer, will support a motion in arrest, because the verdict runs many defects, which on general disclaimer would be fatal. 3 B. & C. 393. 9.

And the reason why this rule does not hold is, common
so is, that if the declaration omits some particular cir-
cumstances, without stating which, the party claiming the
verdict ought not to have obtained it, but which fact, o-
mitted is implied from the facts stated, the defect is aided by
verdict because the jury are presumed to have found that
fact. Thus if in trespass or trover the plff. omits to state the
value of the goods taken or converted, this declaration is
ill. or demurrer, because there is no rule of damages, but
if issue is taken and a verdict found for plff. the defect is
cured, because the jury by this verdict have ascertained the
fact omitted. In other words the plff. has proved the value of
his property converted by the Defend. i.e. the value of the goods
is as given in evidence to the jury. Exp. 407. Comb. 389. Cro. 44.

Plas and pleadings.

colours in trust.

Take the other case of a trespass laid without a day certain. if we go on the ground that it is ill on general demurrer. The only substantial reason why the day ought to be stated is that the trespass may be laid before the date of the writ. It is certainly ill upon special demurrer. But after a verdict obtained in favour of the plaintiff the presumption is that the trespass was committed before the date of the writ, because it cannot be presumed that the jury under the direction of the Ct. would have found the Defendant guilty without the trespass having been committed before the date of the writ.

In other words the reason why the verdict cannot be set aside is that after verdict the Ct. will presume that all the facts not alleged but which are implied in those alleged and found, were proved to the jury on trial.

As in the case of a judgment pleaded without livery of seisin. the Ct. will presume after verdict that there was livery of seisin, because a judgment implies livery of seisin, and the jury have found a judgment.

In other words still. The Ct. will presume in support of a verdict every thing on point of fact which is necessary to warrant the finding. See auth. supra. Bul. 107. 321. Gray. 688.

Or in still other words. The Ct. after verdict will presume every thing which it was necessary for the party to prove for the purpose of proving his issue. Gray. 487. 10. 16. 145. 114. 131. 132. 133. 134.

On the other hand the Ct. cannot after verdict regular-ly presume any fact which it was not necessary to prove, for the purpose of proving the issue. etc. these negative propo-
sitions

Pleas and pleadings.

Notions on the subject.

propositions they will be laid down here after for the purpose of being more distinctly considered. - As to the affirmative propositions then, the Ct. will presume every thing implied in the facts found by the jury.

As if in trespass or trover the p[ar]ty omits to state the value of the goods, so that there may be a rule of damages. This is unfair, but the defense takes issue without taking advantage of the objection & the jury have found the value. They have found what before was uncertain by reason of the omission. They have then supplied the omission. It was necessary for the p[ar]ty to prove the value of the goods, because if they were of no value, the jury ought not to have given damages. It is a fair presumption that they have not only found a value but the value. Leath 389. 315 Ca. 394. Salk 152. ¹³⁰⁰ Bay 810. 10 344. 5 Wm 37. 70 Wm 3. 2

And if in his declaration the p[ar]ty should state a future day, after the trial or time of pleading, the defect would be cured by a verdict, because this is laying an impossible day, and laying an impossible day is in operation of law the same as laying no day at all, and then the case comes within the general rule. Leath 389.

If the grant of an advowson is pleaded without averring that it was by deed, & it is found by the jury, the Ct. will presume that it was by deed, because the grant of an advowson can never exist except by deed. It is presumed that the Ct. will not let any evidence go to the jury which is improper, but if the grant of an advowson was to be proved without deed it is improper evidence. Thus the verdict is said to ascertain those facts, which from the inaccuracy of the pleadings did not before appear. 5 Wm 37. 10 Wm 3. 70 Wm 3. 2

Pleas and pleadings.

Motions in Arrest,
Lecture XIV.

On the other hand nothing after verdict can be presumed to have been proved except those facts which are alleged & those necessarily implied from them. No nothing will be presumed which in point of fact was not necessary to warrant the finding - or in other words still, nothing will be presumed to have been proved which it was not necessary to prove in proving the facts found. This rule in all its various modifications is nothing more than was laid down by Mr. Alderson in saying that a defective title cannot be cured by a verdict.

Suppose then the declaration is wholly void of substance. Issue is taken upon & found for the plff. In such a case the declaration is not aided, because there is no fact to be presumed, which can make the declaration good. Again I tender for calling the plff. "a Jew." Here is no semblance of a cause of action in favor of plff. He cannot have judgment, because there is nothing which can be presumed, which will show that he has a cause of action. And if he claims judgment, he must claim it on the ground of something presumed. 2 Burr. 1728. Doug. 658.

So also if any fact is omitted which is essential to the right of action & which is not inferable from those facts stated & found, this fact cannot be presumed to have been found, & the verdict does not aid the fault. 13 R. 143.

Thus suppose in an action of trespass, or covenant, information of a condition precedent is not averred. The general issue is not pleaded, and a verdict is found for the plff. The Declaration is bad, and the Plff. cannot have

Measure pleadings.

Actions in contract.

judgment, because the performance of the condition does not follow from the facts stated. The Declaration contains a statement of the contract & the non performance of it. There are proofs and found by the jury, but does this prove or even raise a presumption that the plff. has done what he ought to do? No. The things found furnish no evidence of the performance on the part of the plff. Indeed it is obvious that the facts omitted in this case were not necessary to be proved to warrant the jury in finding those facts which are stated. They find the facts which are alleged, but the fact of performance on the part of the plff. is altogether collateral to those alleged. 7 Ho 10^a 1st R. 645. 7 St. & 125. 4 St. 472. 8 St. & 127. 8. 2 Ho. Bl. 574. B. & 2. 321. 322.

Again - A suit in an action on the Case for an injury done by an animal kept by Defendant. It was to do a certain kind of mischief, but omits to state the scienter in the Declaration. The jury find the Defendant guilty. They find the facts alleged viz. that Defendant kept a dog used to bite sheep & that he bit the plff's sheep. But this does not prove that the Defendant was knowing to the fact of his being used to bite sheep. This is not inferable from the facts alleged, & found by the jury. 2 Ta. 662. 3 St. 12.

Again - In an action assumpsit the Indorser of a Bill of exchange, the plff. omits to state a demand of the acceptor or notice to the Indorser of the acceptor's refusal to pay. Defendant pleads the general issue & a verdict is given for the Plff. What facts do the jury find? They find that the Defendant was indorser & that the bill has not been paid. These facts however do not prove that there has been a demand. They

Pleas and pleadings.

Actions in Arrest.

do not even imple a demand. But suppose he does state a demand & refusal but alleges no notice. Now notice is absolutely necessary to entitle the plff. to an action. But suppose a demand & refusal, does this prove that notice was given to the defendant? The existence of these facts does not all prove that the other exists. Doug 654. - 3 B. & A. 12.

And it is very material here to be observed that the Ct. cannot, on principle presume any fact omitted, which in point of Law merely, is necessary to support the verdict. The case of a judgment, where entry of seizure is not alleged, is presumed, is not an exception for the judgment is then specifying thing pleaded.

To presume after verdict a fact omitted merely because it is necessary in point of Law to warrant the verdict, would be to presume on the idea, that the jury are competent judges of the Law. On this supposition, every defect w^d be cured by verdict & there w^d be no such thing known in our Law as a motion or arrest.

Thus suppose in Assumpsit. no consideration is alleged in the declaration. The jury will find a verdict in favor of Plff. Now the consideration is not necessary in point of fact to warrant the verdict in favor of Plff. The jury did properly in finding that the Deft. did assume the promise of there was a promise & it was alleged in the declaration. Of course a statement of a consideration was not necessary to warrant the jury in finding as they did. But in point of Law he c^d. not have assumed & promised w^d there was a consideration. The verdict means only this, that the plff. has proven the matter alleged.

Pleas and Pleadings.

Motion in arrest.

in his Declaration. Of course the p^{off}. cannot have judgment. as the Ct. cannot presume that this point of Law was necessary to warrant the finding. 10 Met 27, 78 R. 351.

In Conn. this point was decided otherwise. I think it cannot now be Law. Kirby 400.

Thus I have explained the true principles on which a verdict is said to cure defects. I have taken the case of an insufficient declaration but these rules apply to an insufficient plea when the verdict is in favor of the Defend.

From the view I have taken it follows that a motion in arrest after a default, or a special verdict, or a demurrer to evidence overruled operates, as a demurrer. There is nothing cured in these cases for there is nothing to be presumed. The Ct. cannot presume anything not alleged because there is no verdict in fact found. 2 Bur. 900. 2 T. 127. 11 Wils 176.

But it is to be observed that in some cases judgment cannot be arrested for the greatest possible defects on the part of the party who has the verdict, or even the nothing is cured by the verdict.

And in such cases, the rule is this - If the verdict is in favor of that party, who upon the whole record appears entitled to judgment, he shall have judgment however faulty the pleadings on his part on which the issue is taken may be.

Suppose the Declaration is radically defective, i.e. wholly insufficient in Law. The plea in Bar is a frivolous one. If one is taken on the plea a Bar is found for the Defend. The verdict here will not aid the plea in Bar, but there can be no arrest of judgment, for as the Declaration is radically defective the p^{off}. is not entitled to a recovery. A frivolous plea in Bar

Pleas and Pleadings.

Motions in Arrest.

is good enough for a writ of Declaration. This motion in arrest looks thro' the whole record and attaches on the first substantial defect, which here is in the declaration. It must be unless to arrest judgment in favor of plff, & then again arrest judgment in favor of the Defend. because the plff's declaration is insufficient. 8 Co 120. 133. 4 Bac. 131. Hol 56. 104. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

Suppose the declaration is good, the plea in Bar and replication bad, if a verdict is taken upon the replication & found for the plff, then the Defend. cannot arrest the judgment. The verdict to be sure has not aided the replication, but the plff. shall have judgment for all the good pleading on his part. There is no defence made to his claim. The replication is good enough for a frivolous plea in Bar. The motion in arrest attaches upon the first defect which appears & that is in the plea in Bar. Hol 56. 2 Co 100. 3 Leon. 244.

And when judgment is arrested in pursuance of a verdict, i.e. when the Ct. refuses to render judgment in favor of him who has obtained the verdict, judgment in favor of him against whom the verdict is found, may be immediately rendered; for, if the person against whom the verdict is found appears on the whole record entitled to judgment, he may immediately have it notwithstanding the verdict. See supra.

Thus suppose the Declaration is wholly insufficient the plea in Bar sufficient or insufficient, the plea in Bar is traversed & verdict found for Plff. Judgment in pursuance of the record is arrested, & judgment is entered for Defe. For here it appears on the whole record that the Defe. is entitled to judgment. One or the other must be entitled. The plff. is not because he has shown no right of action. It must then be for Defe. Hol 56. 199. 200. 8 Co 120. 1 Leon. 301. to 306. 3 Leon. 133.

Pleas and pleadings.

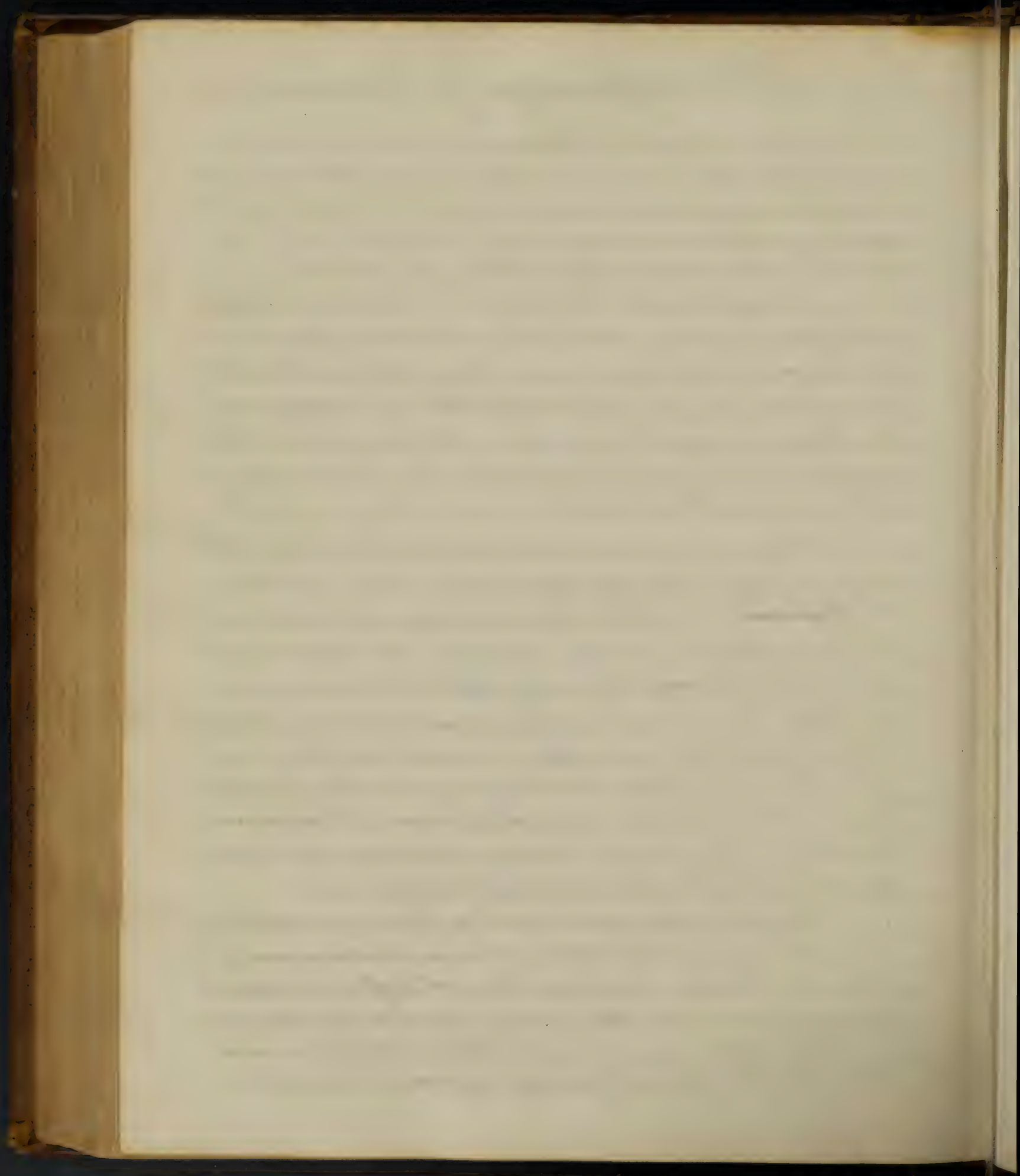
Motions in arrest.

Again. Suppose the Declaration good, plea in Bar primo-
lous, & a replication good or bad, and issue joined for the first time.
in pursuance of the verdict must be arrested and rendered for the
plff. because there is no defence, to the Declaration on the record.
upon the whole record the plff. is entitled to judgment. 11 Mod 301.

But it does not happen that in all cases the party in
whose favor judgment is arrested is himself entitled to judgment, for
if the verdict is found upon an immaterial issue so that the Ct.
cannot know from the record for whom to render judgment,
a replication may be awarded on the judgment being
arrested. The judgment is arrested and the Court order the
parties quod replicentur.

Thus in a case before mentioned. An debt on obli-
gation to pay a sum of money on or before a certain day.
The Defendant pleads that he paid before a certain day.
The Plaintiff traverses this allegation and verdict is found
for the Plaintiff, now the finding is that the Defendant did not
pay before, but the declaration shows that he was allow-
ed to pay at the day, and this he might have done. The
issue then being immaterial, judgment will be arrest-
ed, and the Court will order a replication, that is, give
the plff. an opportunity to take a material issue. 2 Burr.
944. 3 B. & C. 395. 12 Mod 301. 5. Stra. 994. 2 Vent. 196.

Again Suppose in an action of Assumpsit & Executor
he pleads that he did not assume & promise, & verdict is found for the
Def. Now this is an immaterial issue, & the plff. never alleges he
assumed & promised, but that if promise was made by Testator.
Then the judgment will be arrested & a replication awarded.
2 Burr. 196. 3 B. & C. 391. 2 Fard 319. 1 Fard 228. Cro. J. 434.



Pleas and pleadings.

Repleaders.

Repleaders.

So also if the Declaration and plea in Bar are both good & the plff. traverses an immaterial part of the plea in Bar & has a verdict, a repleader may be awarded, because the issue determines nothing between the parties. *2 Rep. 279. 1 Burr 301 & 305. 3 Bl. 395. 2 Wils. 146. 5 Geo. 224. Gro. 240 & 241. 17 S. 6.*

But if the plea in Bar is wholly insufficient & the plff. traverses the whole or only a part of it, there is no repleader, judgment will be arrested, for it appears that no manner of taking the issue could have assisted the Defendant. For his plea in Bar was altogether insufficient & if he was to take a new issue he could not take one more material, and a repleader is never to be awarded for a defect which cannot in any manner be remedied. *4 Burr. 2130. 3 Burr. 301 & 305. 133. 134. 135. 136. 137. 138. 139.*

So if the declaration is good, the plea in Bar insufficient, & the plff. takes issue upon it & Defendant has a verdict, judgment will be arrested, but there will be no repleader for a more material issue cannot be formed upon such a plea in Bar. *11 Co. 10. 2 Salk 173. 1 Geo. 2 224.*

On a repleader awarded the pleadings begin de novo, at that stage of the pleadings, where the first deviation from the rules of pleading occurred. Thus if the plea in Bar is sufficient, & the plff. traverses an immaterial part of it, and verdict is for plff. judgment will be arrested and a repleader awarded, that the plff. may take a new traverse, or otherwise answer to the plea in Bar. *Comp. 510. Salk 173. 216. 579. 3 Bl. 395. 1 Geo. 2*

But it seems a repleader is never awarded for the immateriality of the issue in favor of that party who tender the issue.

Reasons pleading.

W. J. L. L. L.

I know of no decisions in the books on this point, but I think it to be Law. 1 ouy. 380, 600 p. 501. 17 Bl. 644. 1 Sand. 308. 2 Sand. 319

If then in the last case stated, where Mr. H. took issue upon an immaterial point of a good plea in Bar, & verdict had been found for Defend. Mr. H. could take no advantage of the defect. He might have made a better traverse & he admits what he does not traverse.

It is here to be observed that an issue may be material if found in one way, and immaterial if found in another. And hence it is, that tho' an immaterial issue is an incurable defect, & not aided by verdict, yet an immaterial traverse is but matter of form, & yet the issue is formed upon the traverse. The latter is but matter of form, because the party to whom it is tendered may always abandon it, & a traverse if found one way may be material, and if found another may be immaterial. —

This presents a very strange case. Here the travers itself before parallel is matter of form & yet the verdict in some cases makes it an incurable defect. The finding may make it material. * 7 Br. 944. 20 Ld. 173. 31 St. 393.

If the jury after finding a verdict specially, make a conclusion of their own from the facts, the Ct. will not regard their conclusion, but will give judgment on the facts found without regard to the inference made. Thus if the question is made whether J. S. died seized in fee, & the jury find a special verdict & conclude by inferring that therefore he died seized in fee. This inference will be rejected as surplusage and the Court will found their opinion on the facts stated. Mass. 665354.

A rifle leader is never awarded after a des. award, it
*See Supplement 10.

Pleas and pleadings.

Repleader.

is only after an issue in fact, for by a demurrer the parties have put themselves upon the Court. In Lewis a contrary rule is laid down, but it is denied to be Law. A replader is to be awarded only in those cases, where the Ct. cannot determine from the record for whom to render judgment; but here it is impossible for the Court to render judgment upon a demurrer, for the whole record is submitted to them by the parties.

5 Co 52. Pop. 42. 6 Mod 102 3 Lev. 20. 440. contra. - Salk 146.

If a replader is awarded, where it ought to be denied or denied where it ought to be granted, the judgment will be erroneous. The awarding a replader is matter of strict right. Salk 572 6 Mod 2. Pearson Bowles v. Chester Days (last case)

At Com. Law repladers were sometimes awarded before trial, but since the Stat. of Jeofails they are not awarded until after issue found, because under these Stat. the finding may make the issue material.

There can be no replader after a default or discontinuance for here is no issue. The question here will arise upon the whole record who is entitled to judgment. Salk 259. 579. Com. L 323. 6 Mod 3.

If the issue is clearly immaterial, i.e. obviously and certainly so, it seems that even now a replader may be awarded before trial, tho this is seldom if ever done.

11 Bue 90. 103. 6 Mod 2. Carth 371. 4 Leon. 19. 3 Hble. 664 Salk 579.

A replader can never be awarded on a writ of error, because a Court of errors has nothing to do, but to declare from the pleadings as they stand who is entitled to judgment. ^{to a writ of error is made after final judgment} 2 Salk. 519. 4 Bue 129. 2 Lev. 12. 6 Mod 102.

Has no pleadings.

Repleader.

Thus far of motions in arrest and Section XVI.
repleaders for defects in the pleadings.

But judgment may be arrested for defects in the verdict.
So if the jury find only part of the issue omitting what is materi-
al, judgment cannot be rendered upon it, & a venire de novo
issues. The reason is, in this case a material part of the facts
on which judgment ought to be rendered is not ascertained
and the Ct. can render only on what is ascertained. 1 East 111.
6 Co Litt. 227. 1 Vent 27. 12 Mod 5. 5 Bac 296. 20 E. 103 E. Ray. 1521. 6 Ma 1089 per most auth.

But this is not so, if the thing omitted is immaterial.
if it finds all the substance it is sufficient, for then there is
sufficient ground for rendering judgment. 5 Bac 244. 6 Co Litt. 133.
1 Ma 444. 1 Str 227. 1 Vent. 27. 12 Mod 5. 13 Mod 27. 12 Mod 5.

And as the omission of what is material vitiates the
verdict, so also a material variance between the verdict
& issue is good cause for arrest of judgment. As if the jury in-
stead of finding the issue, finds what is foreign to the issue.
So in case of a Bankrupt, the issue being on the point of debt
running void, "the p[er]son is a Bankrupt &c." and the verdict found
that he said he "will be a bankrupt." 5 Bac 244. 2 Robt. ab. 707.
749. 2 Vent. 151. 6 Co Litt. 407. 6 Co 57.

But a verdict which finds the issue is not vitiated
by the finding of more than is contained in the issue. The
Callee is mere surplusage. The judg^t is not arrested accord-
ing to the maxim "ultra petita non vitia tur." Thus
where the issue was whether Peter had a pet. The jury found
that he had a pet beyond sea. The word "beyond sea" was
superfluous & more surplusage. 6 Co. 57. 6 Co Litt. 407. 2 Mod.
747. 5 Bac 297.

Pleas and pleadings.

Repleader.

These rules apply to general verdicts. And if a special verdict finds only the evidence of a fact material to the issue & not the fact itself, judgment will be arrested and a venire de novo awarded, for a Ct. cannot judicially make any inference of fact from evidence put upon the record. The Ct. by the assistance of facts is to determine the Law.

Hence if in an action of trover the jury find a demand & refusal without any conversion. Here the conversion is the gist of the action. Now they do not find facts which amount to a conversion. They only find those which are evidence of a conversion, for a demand & refusal are only facts from which a jury under direction of the Ct. may infer a conversion. Barr. 1243, 10 Co 56. 7. 1 Bos & P 111. 2 Sp 196 590.

And there are cases where the mere finding of damages will destroy a verdict & be a foundation for a motion in arrest.

Thus if there are two counts in a declaration, one good & one ill, and the jury find a general verdict & enter damages, judgment will be arrested, because it cannot appear to the Ct. how great a part of the damages were ascribed on the good count and how great a part on the bad. At any rate the Ct. cannot presume that they were all ascribed on the good count. 10 Co 130. Bul. St. P. 8. 2 Co 437. 2 H 136. 318. 1 Bos & P 329. 321. Doug 362. 2 Mac 7. 1 H 1306. 1094.

And yet it is to be observed that in the last case supposed the declaration would be good on demurrer. This is no exception to the general rule that whatever defect is ground of an arrest of judgment must be such as would be

Pleas and Pleadings.

Repl. ad. 11

bad or demurrer, for this rule relates to defects in the pleadings; but judgment is not arrested in this case for a defect in the pleadings but for a defect in the verdict, for a wrong assessment of damages. This declaration would be good on demurrer because the plff. by having one good count shows one good cause of action. 1 Mod 271.

But if several damages are specified in this case upon several counts, the plff. may release the damages specified upon the bad count & take judgment for those specified upon the good. Thus if in one count the Defend is charged with having said "he is a thief" and in another "a Liar", and the jury find the Defend guilty & that he pay 50¢ on the first count & 50¢ on the second, the plff. may release the last 50¢ & take judgment for the other. See supra. 5 Ray. 13.

And the entire Damages are specified, yet if no evidence was in fact given on the bad count, the verdict may be amended from the moment of the bet. so as to apply to the good count only; if the verdict stands as given in by the jury without being amended judgment will be arrested. This amendment however can be no otherwise made than by the jury is noted. Long 382. 5 Cr. 513. 15. 1 Ser. 134.

This rule with respect to two counts is of no great practical use in Com. except as it furnishes a principle, for we seldom if ever insert two counts. The principle is operative here to answer the same purpose as in Eng.

For a Com. of a declaration consisting of one count (or two distinct causes of action one sufficient and the other insufficient) in Law and a general verdict is found and entire damages judgment will be arrested.

Pleas and pleadings.

Repleader.

As if in slander where Defend. says at one time he is a thief and at another he is a liar.

But still if different parts of that which is Caisors cause of action is so put upon the record that one gives a cause of action and one gives none, judgment will not be arrested. As if in Slander he says that P. defamed him at the same time he is a thief & a liar. Then ought to state all the words said at the same time, & the presumption here is, as in *Lang. 362. 8 D. R. 564.* is that the damages were appraised upon the actionable words. *11 Mod. 346. 433.*

When judgment is arrested in this case there is to be a venire *re de novo* awarded, i.e. a jury is to be called for the purpose of trying the cause again. But there is no repleader, for the issue is right. The defect is in the verdict, and a repleader is never awarded when judgment is arrested for insufficiency of verdict. *Lang. 362. 8 D. R. 564.*

But the rules I have just laid down cannot in their nature apply to criminal prosecutions, for if in any criminal prosecution one count is good & another is bad, judgment will not be arrested after a general verdict, because the jury appraise damages. The jury find the mere fact of Guilt. In civil cases it is the province of a jury to appraise appportion the remedy, but in criminal cases, it is the province of the judge to appportion the punishment, and the Ct. will appportion the punishment on the good count only. *2 Burr. 985. 2 Hawk 627. Salk 384. L. Ray. 886. Doug. 703.*

These are the principal reasons for which judgment may be arrested according to the Com. Law of Eng. tho they are not all. According to the English Law judgment is,

Pleas in Pleading.

Repleading.

arrested only for intrinsic causes.

But in law judgment may be arrested for many extrinsic causes. As corruption, manifest, either in misconduct of the jury. As if the jury ask the opinion of third persons, find their verdict upon the case of a die, upon a game of cards, or the putting their verdict upon the issue of any chance. This is likewise a cause for setting the judgment aside in Eng. in another way. Kirby 13. 133. 4. Str. 442.

Misbehaviour of the parties towards the jury is also cause for arresting judgment. As if one has tampered with, or attempted to influence them, i.e. if the successful party has done it. I suppose the misconduct must be in him, & not in the party who fails in the verdict. This judgment will be set aside in Eng. another way. 5 Bac 292. Went 193.

So if one of the jurors was interested in the suit, or was so related as to be the foundation of a principal challenge, judgment will be arrested. Nay, it has been decided in Comm. that if he is so related to the bail of the party who has sued, so that he cannot be a juror in case of the Bail, judgment will be arrested. Kirby 134. 279.

Another cause for arrest of judgment is that the jury or one of them has been before arbitrator or Attorney in the same cause, or has given an opinion upon it. All these will be grounds of a principal challenge according to the principles of the Comm. Law and a judge, in such case may be set aside in Eng. Kirby 145.

Another general rule as to incompetency of persons is this. If that incompetency goes to the juror's impartiality

Pleas and pleadings.

Repleaders.

and is good cause for a principal challenge, it is a good cause after verdict for arresting judgment, on non:

Thus if the juror is related to one of the parties within one of the degrees which makes him incompetent, it would go to his impartiality, & exclude him. He is presumed to be biased... Kirby 13. 133. 184.

But any incompetency which raises no presumption of partiality in a juror is no cause for arresting judgment. Our Law requires every juror to be a freeholder. Suppose juror is not a freeholder. The verdict will not be set aside because the incompetency of the juror raises no presumption of his partiality... Kirby 184.

And further - tho the juror incompetency does go to his partiality, yet if the party against whom the verdict is given knows of the incompetency, in season to make the challenge, the verdict will not be set aside, because he is presumed to have waived the challenge. 2 Swift 232. Kirby 166.

And for the same reason if one of the jurors has tried the same cause in a Court below, the party cannot merely for this move in arrest of judgment or set aside the verdict, because the juror who tried the cause below necessarily appears on the record the party & not but know them. Supra.

A previous opinion founded upon a general principle of Law involved in the issue is no cause for arresting judgment or even for a challenge, for every man will have a sort of first impressions... Kirby 426.

And it has been decided that if a previous opinion given upon the merits of the very cause tried appears to have had no influence in giving the verdict it is no cause for arresting judgment.

Pleas and pleadings.

Replicadur.

That when the fact was that one of the jurors gave an opinion in favor of the prevailing party & several years before the trial, yet upon being interrogated declared he had absolutely forgotten it, - and when it further appeared that he was the last to give his opinion even after all the rest had agreed upon the verdict, it was decided to be no ground for arrest. Hardly correct, dangerous decision says Mr Gould. Kirby 62. 2. Fiske 232.

But tho' a judgment may be arrested for intrinsic causes, yet the Ct. on a motion in arrest will never go into the evidences on which the verdict was found, for this would be assuming the province of the jury. Kirby 61. 87. 142. 273. 277. 2 Safr. 264.

By the way in 2 Swift 284. there is a mistake. He says
on a motion in arrest for misbehaviour in the parties or
favors a repleader is awarded. This cannot be. He must
have meant a venire de novo, for there is no defect in the
pleadings.

Tho' it is true that in Eng. judgments are arrived at only
for intrinsic causes, yet it is also true that in Eng. verdicts
are set aside and judgments arrived at, for certain causes not
appearing on the pleadings, nor in the verdict.

And this result is effected in Eng. for the same causes I have just been mentioning. But if it ~~is~~ not appear on the record how can the propositions be consistent with the principle, that a judge can be resisted only for intrinsic causes, it is consistent. The mode of proceeding is this. Upon entering into the facts, the judge is a vice price just as upon the parties and they then become intrinsic causes. In loan the judge in Bankruptcy is a vice price on the record. 5 Mac 288, 241. 2. 2. Sim 205. Bank 57. Sim 642. 2. 2. 11. 100.

Pleas and pleadings.

Repleaders.

But in two cases in Eng. the same proceeding has been used in Bank. This is inconsistent it is true with their general rule. 5 Bac 291. 1 Term 79. 2 Jones 83.

Neither the one nor the other of these causes is the usual one in Eng. The usual way is to have these extrinsic causes the foundation of a motion for a new trial. 5 Bac 250.

Awarding Costs.

In judgments being arrested no costs are regularly allowed on either side. For the party moving in arrest might have demurred & prevailed to the delay & expense of a trial. The Ct. is bound to pronounce judgment in his favour, for this is a matter of strict right but costs are not. Salk. 579. 2 Vent. 196. 10 T.R. 267. 1 Moot 69. 70. 572. Stra 577.

And if a motion in arrest of judgment is overruled and the party moving prays a writ of error on the ground that it was erroneously overruled & prevails in error, he recovers no costs not even those incurred in the Court below. The pty. in error never obtains costs in the writ of error, but he usually does those incurred in the Ct. below. In this case he does not, & the reason is he ought to have taken advantage of the defect earlier. ~~Comp 407. Supra.~~

But the general rule, viz. that no costs are allowed, does not obtain when the judgment is arrested for causes originally intrinsic, not appearing in the pleadings nor in the record. The reason does not apply. He is not in fault for not taking advantage of a defect, because it did not exist at the time. Moot 572. 477.

Nor does the rule hold in cases where the issue

Pleas and pleadings.

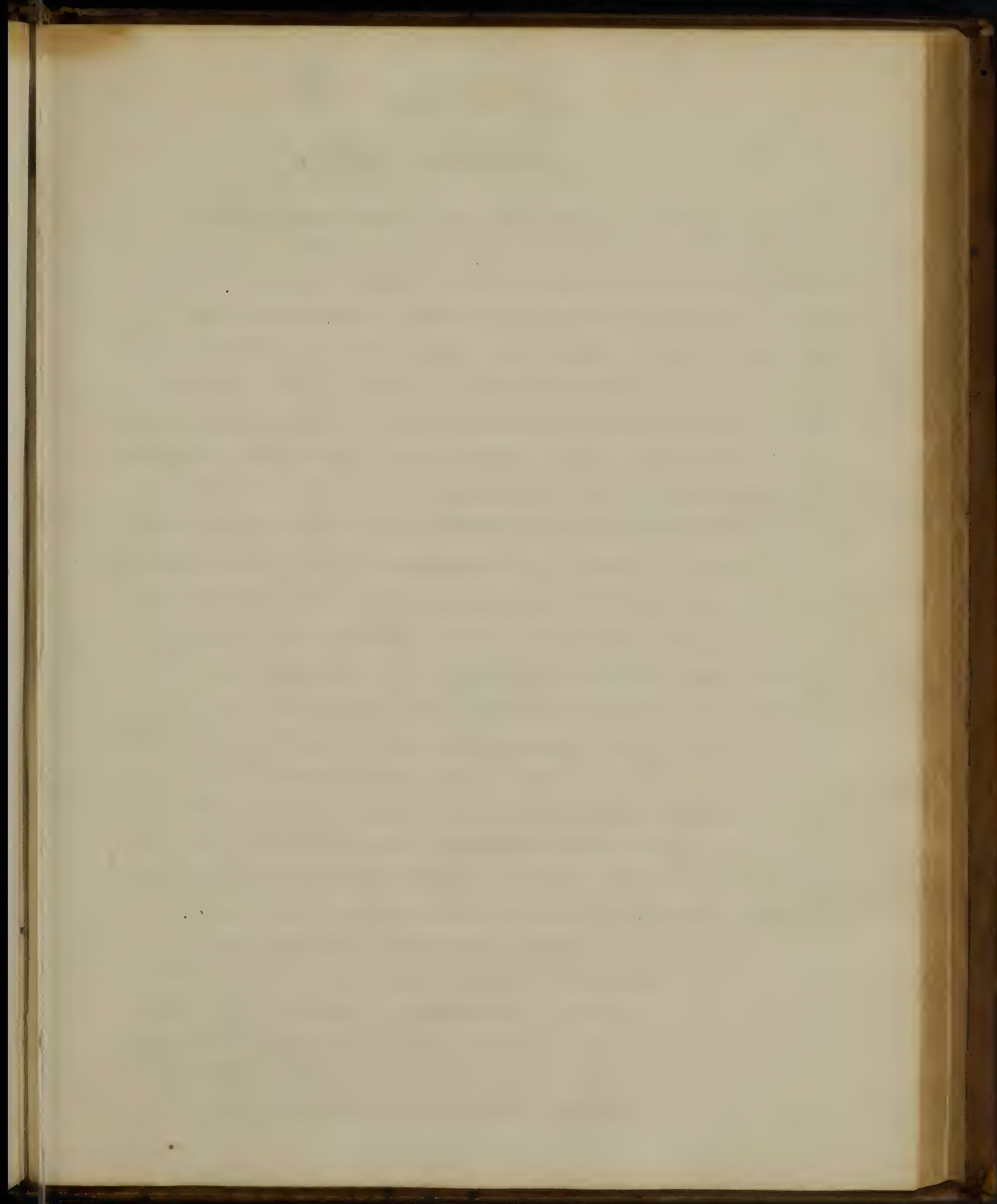
Surrounding costs.

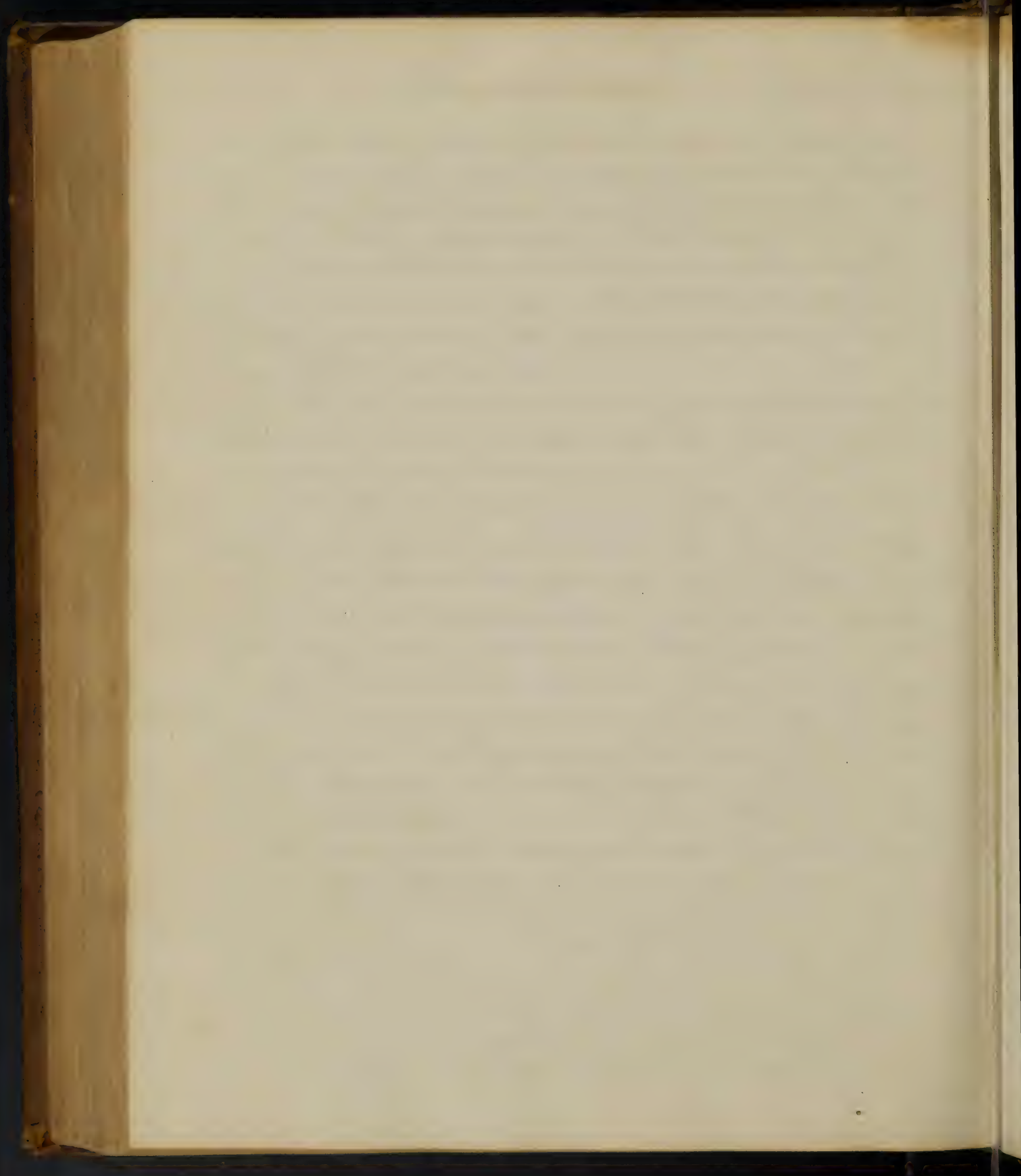
in fact is tried by the Ct. because under an issue under an issue in fact taken to the Ct. tried, exceptions may be taken to the pleadings on a demurrer. Indeed where an issue in fact is given to the Ct. there cannot be a motion in arrest. Advantage should be taken of any substantial defect under the issue. I think this is hardly correct. The Ct. upon finding the issue on fact render judgment immediately. 2 Swift 269.

In Eng. motions in arrest of judgment are made within the four first days of the next term after trial. They are made in Bank. 3 B.L. 395.

In Con. motions in arrest of judgment must be made on the verdict being accepted by the Ct. & must be delivered to the Clerk or the opposite party reduced to writing within 24 hours after acceptance of the verdict, exclusive of Sunday. At any rate before the end of the term, whether there are 24 hours or not remaining. 1 Wood 572. Kirby 235.

The form of a motion in arrest is this. The Defend. after verdict & before judgment rendered here in Ct. moves the Ct. that there may be no judgment rendered, for he says the Declaration is insufficient in Law & reason to found judgment in Plt's favor. If on the part of the pl't. the same mutatis mutandis. 1 Root 572. — For Form see 3 B.L. app. 7. 11.





Pleas and pleadings.

New Trials.

An application for a New Trial in Eng. is always by motion. This motion is for a rule upon the adverse party to show cause, why a new trial should not be granted.

If a rule to show cause is granted the judgment is suspended, because the motion is made before judgment is rendered. The granting of a rule to show cause is not the granting of a new trial for after the rule is obtained, the reasons for allowing a new trial are discussed in Banco.

This new trial is granted there by making the rule absolute, or refused by discharging it. The motion then only suspends the judgment until the rule is discharged, but the making the rule absolute prevents the judge from being rendered. In Eng. a new trial is always to be had before judgment, but after judgment it cannot be set aside by a motion for a new trial, yet it may be granted at any time before the judgment. Day or Doug. 760.

In Con. a motion for new trial is usually made by petition, & when application is made in this way, it is made after judgment for a petition can never be made at the same time with the verdict rendered. The reason why applications are made in Con. is that formerly new trials were not granted by our Cts. of Justice. The application was to be made to the Legislature alone and that was to be done by petition. Afterwards a Stat. gave the power to the Sup. & Cts. Courts & the same mode of application continued. Under this Law the same course was pursued and is now pursued, viz. by petition. Stat. 28.

Pleasure pleadings.

New Trials.

It seems however that new trials might have been obtained on motion as well as by petition after this Law. There is no difficulty arising from the structure of our system of jurisprudence. I suppose therefore an application for a new trial might be obtained on motions unless because the universal usage has been otherwise. *Reed, 163.*

But now in consequence of a new rule of Ct. made by the Sup. Ct. application may be made for a new trial in that Ct. by motion in a certain class of cases, viz. in that class where exceptions to the verdict might have been taken by bill of exceptions. In this rule the Sup. Ct. have determined that they will sign no bills of exceptions in pursuance of a Stat. authorizing the Sup. Ct. to make such rules of practice as they think proper. When then the objection to a verdict is one which before this rule might have been taken by a Bill of exceptions, it may now be taken by a motion for a new trial. *Stat. 678.*

There was formerly no time in Con. limited within which a petition for a new trial must have been brot. In 1804. a Stat. of Limitations was made. Under this Stat. no application can be made for a new trial except within 3 years after the payment.

In Eng. the motion is to be made within the four first days of the term next succeeding the trial. The motion then there must be made before judge. & within 4 days as above. In Eng. when the application is by petition it must be made after judge. & within three years. When by motion it must be made before judge.

Motions and pleadings.

New Trials.

because here a judgment cannot be set aside by motion.

The petition in law sets out the grounds of the application as any other petition does. The opposite party may plead to it, demur to it, or deny it. But still if he demurs to it, or it is overruled there is to be a trial on the merits, for the Ct. will not set aside a judgment of its own merits because a demurrer to the petition has been overruled.

The bringing or pendency of this petition is no stay to the proceedings. The granting of a new trial destroys the judgment, but the pendency is no supersedeas.

An application for a new trial is according to the general rule an appeal to the discretion of the Ct. The claim is not stricti juris & hence a new trial will not in general be granted when justice appears to have been done by the verdict, altho' it was done in a singular way. Neither where the claim is a very hard & unconscionable one will a new trial be granted. I have known no case to allow the plea of usury, or the Stat. of Limitations. So where the party moving for a new trial makes it appear by his own showing that he is entitled to very small damages. The Ct. in their discretion will never minister to the passions of men. 3 B.R. C. 391. 2. 1 Bos. & P. 338. 2 T. R. 4. 2 Wils. 306. 7 Salk. 644. 3 East 451.

And as the granting of a new trial is in a great measure discretionary with the Ct. the Ct. may in granting a new trial impose terms upon the party obtaining it. Thus where a party, &c. upon an application for a new trial is made, makes it probable that the

Pleas and Pleadings.

New Trials.

party moving for a new trial is himself in possession of facts which will destroy his cause, the Ct. will not grant a new trial unless the party will disclose on oath what he knows about the case. So the Ct. will refuse to grant new trials in many cases, unless the party moving will admit certain facts which are true.

So also they may by way of condition compel him to produce Books or papers which tend to throw light on the subject. And in granting a new trial may lay him under conditions which under the circumstances of the case appear just & reasonable, as they may compel him to allow old & infirm witnesses to be examined. Salk. 642.

In Eng. if the ground of the application is any thing which passes at the trial, the information on which the Ct. is to act is taken from the judges report of the case, but if it did not appear at the trial it is to be disclosed by affidavit. 3 B.L. 391. 10 L.J. 235. 2 L.W. 145.

This rule has in general no application to our practice. It has not application in any case where the trial is before the County Ct. because the trial is had before the same Judges. But in Eng. the trial is first had before a single Judge at Nisi Prius. Before our Sup. Ct. this rule has an application in certain cases. Where the motion is made to the Judge, before whom verdict is given there is no reason for information from the Judge. But where the point is reserved for the opinion of the whole Ct. the rule applies. There must be a report, & the statement is made in writing signed by the presiding Judge.

Pleas and Pleadings. New Trials.

It is certainly a general rule that error is not predicable of a decision of a Ct. in granting or refusing a new Trial, for the granting is discretionary. Error is not, in general predicable of a discretionary authority. But I conceive there is a supposable class of cases where error would be predicable. Suppose a new trial is granted in a case where from its nature it is not under any circumstances grantable, error will be predicable of it. I know not that any case has occurred in Eng^l. But suppose a man indicted for a felony is acquitted and then on motion of the Attorney General a new trial should be had & he should be convicted, this would be error. It is always true that error is not predicable of a decision of a Ct. in refusing a new Trial. *Kirby 41.*

In Con. a new Trial is never grantable by a single Magistrate, because the Stat. delegates the authority only to Superior County Courts. *Stat. 28. Kirby 9.*

As to the origin of the practice of granting new Trials the opinions idicta in the Books are much at variance.

Blackstone traces them to the time of Edward III. others are of opinion that they did not exist until the time of Cromwell. They certainly existed before the time of the Protectorate. The cases in the time of Edward were for mistakes of jurors. The cases in the time of Cromwell were for excessive damages, because excessive damages raised a presumption of mistake in the jurors. Since this time many other causes operate to grant a new trial. *3 Bla. 6. 587. 8. 2 Str. 995. 1 Holt 648. 1 Flow 252. 1 Bur 394. 5. 3 T. R. 131.*

Of late years, new trials have been granted after a

Pleas and pleadings.

New Trials.

trial at Bar. It was formerly supposed that after a trial at Bar there could be no new trials, because it was to be made to the same judges, who had given run to the application for a new trial. Yet this reason did not apply in many cases, for new trials ought to be granted for mistakes of jurors, and the presence of the whole Ct. does not preclude mistakes in jurors any more than a trial at nisi prius. But that idea is now exploded. New trials are granted after a trial at Bar. Trials at bar never take place except by special order & permission of the Court, & it is discretionary with them. The reasons for granting them are, great value of the case, length of time in prosecuting it, and great difficulty attending it. 1 Bur. 395. Doug. 420. L. Ray. 1360. Stra 585. 1105.

And in general it is a maxim or standing rule that in all cases of sufficient importance a new trial may be granted, if it can be made to appear that injustice has been done at the former trial. True there are some cases where for reasons of policy this rule will not apply. As where the Defnd. has been sworn after he has actually paid the debt & he has lost his receipt or discharge & afterwards has found it, a new trial will not be granted. The truth is, a more general rule is that a new trial will not be granted unless injustice has been done... 3 Bl. 388. 1 Bur. 395. 6 T. R. 638.

This general rule requires that the case be of sufficient importance, for when the case is of small consequence, a new trial will not in general be granted. 4 Burr. 2093. 1 Bur. 12. 655. 395. 4 T. R. 758.

Pleas and pleadings.

New Trials.

And it seems to be a general rule in Eng. that a motion for a new trial cannot be made after a motion in arrest is made, except when the cause for moving a new trial was unknown at the time of moving in arrest. The reason of this I think appears to me to be the other way. Suppose the motion in arrest not to prevail. Why ought not a motion for a new trial to be made? that is if the party is entitled to it? And further this seems to me to be a positive reason the other way. For if a new trial actually takes place still there may be a motion in arrest of judgment after that. I think the motion in arrest of judgment ought to be tried first, because why sh. a new trial be granted when a motion in arrest of will founded would make the motion for a new trial perfectly useless. Salk. 647. B. & P. 325. 6.

It has been held that where there are several Defendants & all of them have been acquitted, or part acquitted & part convicted, no new trial could be granted as to one or any number short of the whole, because it is said the verdict must stand entire or fall so. — This rule if it should stand would work great injustice. Suppose one is convicted & one is acquitted, there never could be a new trial, for if all the parties the the record on one side must join, in a new trial, there can be none when one is acquitted, because he cannot petition for a new trial. The rule is clearly unexpedient one & lately it has been denied. 3 Salk 362, 3 H. 630, 12 Mod 275. Stra. 814. Bul. & P. 238. 5 T. R. 638.

The causes for granting new trials are quite

various. I will mention some of them.

1. The want of legal notice to a Defend. in an action is a good cause why he should obtain a new trial. The general rule of the Com. Law is that a party must have 15 days notice in a civil action. In Com 12 & 14. It is said if he has not had this due notice & he does not appear & judgment goes against him & a verdict & judgment is given, he may obtain a new trial. But if he appears & defends this cures the defect of notice. He waives all exceptions to it, & cannot afterwards obtain a new trial. Salk 646, 435, 428, Pe. P. 327.

And this is such a case where the Court cannot in its discretion refuse the granting a new trial. Suppose the Defend. has no notice at all. The Plaintiff makes a false return. I suppose he would be entitled to a new trial, for I conceive he has at any rate a liberty of being heard. A man has an unquestionable right to take advantage of every legal defence, and as he has once been cheated out of it, he ought to have the opportunity by a new trial.

2. A new trial may be granted for a defect or mistake of the Judge before whom the verdict is obtained. As when the Judge is so interested in the question to be decided as to be incapable of judging; as when he admits or rejects, or excludes proper evidence; or misdirects the jury on point of Law. These are mistakes for which a new trial may be granted. 119, 120, 121, 202, 428, 753, 13 & P. 327, 513 ac 244.

But the admission by the Judge of improper evidence

Pleas and pleadings.

New Trials.

objected to is ground for a new trial, yet the admission of an incompetent witness of itself not objected to at the trial, is not a ground for a new trial, nor tho the fact of the incompetency was known at the time of the trial. It may have its weight with other reasons. 1st Re. 717.

But in 1796 our Sup. Ct. allows a new trial upon this sole ground & the evidence not objected to was written evidence. This is a much stronger case than the one recited in the Books. Parmelee v. Lamb. Sup. Ct. 1796.

Lecture XVIII.

3. Defects or incompetency in the jury or jurors are good causes for New trials. Defects or incompetency mean the same thing.

But if the incompetency were such as might have been ground of challenge, & the fact was known in season to take advantage of it in that way, it will not be ground for a new trial. — Secus if not known in season to challenge. In a case in Stiles a new trial was refused, but it was because the incompetency was known at the time of trial. 5 B & C 245. 7 M & S 54. 10 W & T 30. Stiles 129.

In such cases a bon. motion in arrest of judgment is concurrent with granting a new trial. In Eng. it is generally taken advantage of by New trial.

4. So the misconduct of the jury, as partiality, inattention or the like is ground for a new trial. So if they refer the decision to a game of chance. In doing any thing that prevents fairness of trial is ground for a new trial. Stea 642. Bunt 51. 2 L & R 140. 5 B & C 250. 255.

It is not necessary that all the jurors should have been guilty of misbehaviour; misbehaviour in one is

Pleas and pleadings.

New trials.

sufficient. So where the Foreman has said the p^lt^s should never have a verdict, let him produce what evidence he would. To say the misbehaviour of one is sufficient to vitiate the verdict, for unanimity is necessary in the jury. Salk 645

In early times perfect unanimity in the jury was not required, but for a long time past it has been necessary both in Eng. & in this country. 3 Bl. C. 375. 6.

If they don't agree the jurors are carried around with the l^o. till they do. This has never obtained in the United States, and it is not necessary to be used in Eng. for the danger of incurring, in direct unanimity. If not unanimous then the verdict is bad & must be set aside. So if it is the verdict of eleven it is bad. It must appear at least to be that of all the jury.

But an expedient has been resorted to, to evade the rigour of the rule, viz. by letting the minority come in, and acquiesce in the verdict, & it stands unless they dissent, and the law will not testify their dissent after the verdict is recorded. Comb. 14. 5 Bac 257. 291. Kirby 141. 416. 2. f. 263.

In Eng. the jury when retiring to agree in a verdict, are locked up till they agree. and after they are locked up eating or drinking before the verdict is delivered to the judge, is misbehaviour. This is to compel them to an agreement.

Yet the verdict is not vitiated by the jury's eating or drinking. It is only misbehaviour that renders them liable to be fined. It does not go to the fairness of the verdict. 10 Cat. 125. 3 Bl. C. 375. 4 Inst. 227. 12. 1140 111. 5. Ray 148.

But if the jury eat or drink at the expense of either

Pleas and pleadings.

New trials.

of the parties & the verdict is in favor of that party, it will be bad & a new trial may be obtained. 10th. 272 & 273. 10th. 25. 12th. 111.

But to relieve the jury from the hardship arising from the rule, as to abstinence arising from eating & drinking, privy verdicts have been devised. In New York they are not allowed to have wood or candles.

Privy verdicts are delivered out of Court to the judges. But these are not binding. The jury may vary from it, when they deliver their public verdict. So it is only a mode of evading the rule by complying with it formally. 10th. 271. 10th. 272. 3d. 6. 377. 5th. 282.

The delivery of privy verdicts has this effect viz. if they eat or drink after delivering a privy verdict, it does not vitiate their verdict, unless they afterwards change it in favor of the party who procures the food. 10th. 125.

But privy verdicts are never allowed in cases of felony, in cases of life or members. Indeed never where the personal appearance of the Defend. is necessary to his conviction. Indeed I conclude where it operates in personam as whipping &c. like, it can't be given, for in such cases the personal appearance of the D. is necessary. Secus, where a mere fine is inflicted. So in such cases as these, the jury must be confined till they agree. 10th. 193. 10th. 97. 2d. 687. 697.

In con privy verdicts are not necessary, for the jury are never confined at all. This happens is dangerous in cases where there is a popular verdict.

It is said in Vaughan's Reports 147. that a jury may found a verdict on their own personal knowledge.

Pleas and pleadings.

New Trials.

This cannot be Law. If he has any knowledge on the subject, he ought to make it known in open court, & if not, the verdict is bad. The reason is each party has a right to cross examine & to meet any evidence by contrary testimony. 3 Bl. C. 374.5. 1 Sid. 133. 5 Bac 289. McNally 238.

And in pursuance of the same principles the jury have no right to re-examine any witness after retiring - not to ask him to what he did testify before, for he may not give a true answer. If they do thus examine, it is ground of a new trial. Cro E. 189. 411. 5 Bac 288.

And on Eng. it is a rule that the jury cannot take out any written evidence, actually exhibited in open Ct. without the consent of the parties or judges. If all says of the writing furnished evidence on both sides the verdict is good, otherwise not good. This leaves the rule loose. The evidence may be strong on one side & light on the other. I do not think the party ought to have a trial right to deliver to the jury the evidence which was exhibited in Ct. for they understand it better by perusing it. In law the written evidence goes to the jury as matter of course. 1 Inst. 227. Cro E. 411. 2 Hawk. 148. 12 Mod 250.

But if the jury takes with them any written evidence not exhibited at the trial, the verdict is bad here & in Eng. and a new trial must be granted. They have no right to found a verdict on evidence not exhibited in Ct. 1 Sid. 235.

But tho the jurors misbet avow & initiate the verdict, yet they have no right to tell the fact. For only it was otherwise. I do not see the reason of this.

Pleas and pleadings.

New Trials.

For to impeach his own verdict does not prove perjury, but only proves a breach of a promissory oath; an oath of office. In other cases a man may testify against himself if he will but in this case he is not allowed. 16 H. 6. 189. 5 Bac 288.

In all these cases motions in arrest of judgment are concurrent with new trials.

5. It may be a ground, tho not always, for a new trial, for the jury to find a general verdict, when directed by the Ct. to find a special one. The reason of requiring a special verdict is to let the Ct. have the naked facts, that they may apply the Law.

Yet this is not a misdirection, & therefore the jury are not fineable, for they may find a general verdict if they please. 'Tis not illegal. But if they find the Law as the Ct. think they ought to, a new trial will not be granted, tho a general verdict was found, when they were ordered to find a special one.

So it seems to be the finding verdict contrary to Law, that is the ground of a new trial & not the finding a general one when directed to find a special verdict. In one case a new trial was refused, but that was after a trial at bar, 1 How 6 213. 5 Bac 281. 7 Moo 37.

6. A verdict being contrary to evidence is ground for a new trial in Eng. & in Con. Swift says otherwise. Indeed there formerly was a doubt about it. But it is now settled that it is the Law in Con.

Yet the Ct. being pretty strongly inclined in favor of the unsuccessful side will not be a reason for a new trial. Indeed the rule used to be, that it must be so that no

evidence be adduced, or more that amounts to any thing, in favor of the party, for whom the verdict is found. But now if the verdict is clearly agt. the weight of evidence a new trial will be granted.

So where the scales of evidence are nearly equal, none will be granted. But where there is great inequality, a new trial will be granted tho' there be some little evidence on the other side.

There has been much controversy on this point; for it is said the jury are the proper judges of the evidence and therefore it is said the Ct. assume the province of a jury by allowing a N. Trial. here. But I think it is not true, for they do not assume the power of trying the issue themselves. No they only refer it to another jury to try the question over again. *Comp. 37. Bul. N. T. 326. 7. 2 Str. 1105. 1102. 3 Bl. C. 342.*

7. Again. If the jury have given a verdict on a misconception in point of Law, or generally agt. Law a N. Trial may be obtained. So it often happens where the jury find facts, they make a wrong conclusion from them. So if an action against endorses of a promissory note no proof of notice having been given to defend. Jurors may testify to it, provided they find for plff. *Balk 646. Str. 445. 425. 2 Burr. 1078. Comb. 402. 4 T. R. 470. P. Ray. 147.*

In some cases applications of this kind have been successful, but it was because the Ct. were not satisfied that this was the case.

But a N. Trial will not be granted of course where the ground of the application is very hard. If the Ct. think that

Pleas and pleadings.

New Trials.

substantial justice has been done, none will be granted. So where the plff. is entitled only to nominal damages, but verdict is for Defs. Then a new trial is granted to obtain the ends of justice only. 5 B. & C. 246. 7. 41 B. & C. 209. 3. 4 T. R. 758. 2. C. 14. 5.

8. In certain cases, smallness of damages is a cause for a N. Trial. But this is only in contracts, where a clear rule of damages is given. No cases where the action sounds in tort & damages are presumptive, in which a N. Trial is granted.

So if in an action on bonds, the jury should not make allowance for interest a N. Trial would be granted.

But in Malicious Prosecution, assumption of no N. Trial is granted. Yet I should think in some hard cases a N. Trial might be granted, tho' the action sounds in tort. But no case of that kind. Stra 940. B. & C. 327. 4 T. R. 655.

Indeed in one case the Ct. said there was no reason why a N. Trial should not be granted as well there as in other cases. 2 B. & C. 554. Stra. 425. 1259.

9. Grossness of damages is ground for a N. Trial both in contracts & tort. If so why not for smallness of damages. And this formerly it was thought no N. Trial could be had for grossness of damages, but that idea has been long exploded. Bul. N. 237. Stiles 462. 1 B. & C. 609. 3 B. & C. 184. 5. 15 T. R. 277. 5 T. R. 257. 4 T. R. 657. 7 T. R. 529.

When N. Trials were first granted on this ground, it was thought to be on the ground of partiality presumed. But now there is not supposed in many cases to be any partiality and yet N. Trials are granted. An. Con a N. Trial has been granted under these circumstances. 1 B. & C. 15.

Pleas and pleadings.

St. Tr. Trial.

for debt, & told the defence that damages were laid only to the amount of 50£. to Defend. Co. it go by default, & p^l look out. 100£ damages. This is excessive & besides it is as misconduct.

In some cases of very great damages no St. Trial. is granted. So in actions for Crim. Con. The opinion has been that in such cases a new trial could not be obtained. But why not as well as in case of Battery. To be sure there is more of a rule of damages furnished in the case of battery than in cases of Crim. Con. as loss of time, and Butler in one case says it might be granted even in this case. Naynor hints the same opinion. In case of Battery the damages by way smart money can never be excessive. It is analogous to Crim. Con. 1 Bur 309. 4 Cr. 16. 65. 5 Cr. 16. 257.

But in cases of assault & battery a St. Trial. may be granted. In case of an action for injury & servitium, a misde. for injury to p^l's daughter, the damages can never be excessive. Hence the same observations et supra might be applied. I see no reason why a St. Trial. may not be granted in both cases. 1 Cr. 16. 277. 5 Cr. 16. 257. 2 Cr. 16. 167. 3 Cr. 16. 18.

New trials may be granted in cases of Slander. The cases of Slander have been generally where there was misconduct on the jury. See Stiles 462. But generally agreed to be as here stated. 1 Bur 394. 1 Cr. 16. 277.

Ld. Camden has strongly contended in one or two cases that judges ought not to grant a St. Trial. in case of torts, unless the damages upon the first trial appear most outrageously excessive. He says it is substituting the Ct. for the jury. But this observation would apply

Pleas and pleadings.

New Trials.

in case of a verdict contrary to evidence. But all allow that in such a case N. Trials may be granted. Hamlet has frequently been tho't more of a Statesman and than a judge in his observations. He would always oppose S. Means &c. The rule is now well settled wth his opinion. 2 Wils 205. 244.

If by a mistake in the jury in point of computation, the plff. recovers too much a N. Trial will be granted. So if on Bond they calculate interest wrong. But plff. may prevent a N. Trial by releasing the ex. p^t. 2 W. R. 113. 23. Camp 571. 2 Ld. 262. 1 East 367. 3. Goulden XXX.

Under our Law the mistakes of counsel in pleading a wrong p. l. w is a ground for a N. Trial. This is what is called in our Stat. mispleading. I do not find that a N. Trial has been granted for this precise cause in Eng. tho' Jus. Buller says in a certain case where the effect of the plea was misconceived by the counsel tho' he tho't it ought to be grounds of a N. Trial. It ought to be more general in Con. than in Eng. because here a party can plead but one plea, but in Eng. under the Stat. of Chancery a party may plead many pleas. Stat. 28. 2 W. R. 131. 10 Mod 302. 3.

And it is clear that the neglect of the counsel is also a ground for a N. Trial. The remedy of the party is ag^t the Attorney. 6 W. 8. Mod 222. 122. Salk 645.

I doubt whether in Con. a N. Trial would be granted for mispleading when the defence is an unconscientious one as Usury & Stat. of Limitations. In Eng. in a very modern case the Ct. refused to postpone a trial, because the defence was an unconscientious one, to wit. Usury. 1 Bos. & Pul. 52.

Pleas and pleadings.

New Trials.

When an application is made on this ground in Con. the petition must state the plea in defence which he is to make, that the Co. may see whether it is sufficient, and he must also state that he is able to perform it. 1 Hall 578. 2 Swift 271.

That a material witness was absent at the first trial thro' inevitable accident or misfortune is a good cause for a N. Trial. As if he was prevented from attending by a go. sudden illness, or by any thing which is clearly a reasonable & sufficient excuse for not attending. 5 Bac 252. 11 Mod 1. 6 D. 22.

But a N. Trial will not be granted for this cause unless in the petition the witness will make affidavit of what he knows that the Co. may see whether it is material, & likely to affect the issue. Salk 645.

In Con. the petition states the testimony which the witness will give & before the petition is granted the witness must state what he knows, either by deposition or viva voce as in common cases.

Again. The absence of a material witness when occasioned by the covin, fraud or practice of the opposite party is cause for a N. Trial. Not to grant a N. Trial in this case would be to allow a party to take advantage of his own iniquity. 5 Bac 252. 11 Mod 141.

But the wilful absence of a witness, or absence thro' his own negligence is no ground for a N. Trial. 5 Bac 251. Salk 653.

And a new trial is never granted for the absence of a witness whose testimony the party might have had

Plea and pleadings.

New Trials.

by using due diligence. Hence he suffers in consequence of his own neglect. Halk 647. Stra 691. 1 Wils 98. 5 Bae 252.

Surprise occasioned by the introduction of unexpected evidence on one side is no ground for a new trial. This is the English rule. Now is a mistake made by a material witness a ground for a N. Trial. The reason is, Cts. have thought it dangerous to grant a N. Trial after one party had understood all the evidence on the other side, to have an opportunity to mould or shape the evidence according to exigency of the case. 2 Atk 319. Stra 691.

Some Cts. have in repeated instances granted N. Trials where the material witness has made a mistake and it could be proved.

Another ground for a N. Trial in Conn. is the discovery of new evidence, which is material. It is so made expressly by Stat 78. and it is said in this case that it is a ground for a N. Trial in Eng. but the current of authority is the other way. The Cts. in Eng. proceed upon the ground that it is of dangerous consequence, as in the case above specified. 12 Mod 584. 5 Bae 252. 7 T. R. 267.

But a N. Trial will not be granted in such a case unless the Ct are satisfied that the evidence is material and that it is newly discovered, for if by common diligence the party could have known & obtained the evidence before, it is no ground for a N. Trial.

A petition for a N. Trial on this ground, must state what the evidence is, i.e. the substance of what was before given - also must name the witnesses who not all the witnesses, if there were do just testify. Ridg 283. 1 Root 89. 2 Swift 270.

Pleas and pleadings.

New trials.

If the cause has been lost by the testimony of a witness legally infamous, & that was unknown to the party agt. whom it was used as evidence, a N. trial is granted on English principles and on our own. This is settled in the English Books. There is a case in Salk. where the Co. refused, but it was upon the ground of knowledge in the party. Wts. of Pleas by. usually allowed N. Trials in a Co. of Law under their direction. This is not now necessary. The common practice is now out of use. The reason is he has lost a verdict by illegal evidence, which he did not know was illegal at the time. 11 Rep. 394. 5. Salk 653. 12 Mod 584. Bac. Chy. 194.

Misconduct of parties is in certain cases a ground for a N. Trial. If one party treats the jury, or if he solicits a person to find for him, or makes any representation to the jury in his own favor, - these are all causes.

So also if the attorney of the successful party is guilty of improper conduct towards the jury. And in general any kind of impropriety, i.e. any attempts unduly to influence the jury is good cause for a New trial. 11. Mod 141. 2 Vent 173. 1 Vent. 125. 3 Bac. 292. 4. Bl. 140.

It was formerly holden that N. Trials were not grantable in actions of ejectment, because a judgment in an action of ejectment is not conclusive between the parties, & of course a new action may be brought. The reason is the parties are all fictitious & so are the proceedings. Salk 648.

The rule now is that N. Trials may be granted in ejectment as well as in any other cases if the verdict is for plaintiff. When it is for Defendant it will not be granted unless there is something very particular or extraordinary in the case.

Pleas and pleadings.

New Trials.

The reason of the distinction is if the Defend. prevails, the parties are in statu quo, but where the p^{ro}sec. prevails they do not remain in statu quo because the Defend. by reason of the judgment is turned out of possession. Salk 648. 650. 4 Burr 2224. - Stra 1106. 5 Bac 253. 4.

It has formerly been said that after there have been two several verdicts, between the same parties, and the determination the same way there ought not to be a New Trial. This rule does not now exist, for there may be after three. A remarkable case in Pennsylvania. 6 Mo. 22. Salk 649. 1 Sid 31 or 32. 3 Bl. C. 387. 4 Burr 2108.

And it is a general rule that new trials are not grantable against a Defend. in Criminal cases, tho' they are granted in his favor many times. This is a rule founded up on the benign principles of the Crim^l Law. Camp 37 1 Root 86. 7.

According to Eng. Law a New Trial is not granted in all criminal cases on favor of Defend. In all criminal cases where the offence is higher than a misdemeanor, no new trial is grantable on either side. 6 T. R. 638.

But where the offence is not higher than a misdemeanor, a Ct. may grant a New Trial in favor of a Defend. as for Libels, breach of the peace, Perjury &c. 6 T. R. 638. Stra 968. 1012. 2d. Ray 63. Doug. 760. 5 Burr. 2669. 1 East 159.

It is indeed a strict rule of C. Law that no party shall twice be put in jeopardy of his life. In Civ. New Trials are granted on favor of Defend as well in cases of felony as in other cases, and this is the rule under the Laws of the United States. 1 Root 86. 7.

But where the offence does not exceed a misdemeanor

Pleas and pleadings.

New Trials.

it seems to be the rule that no new trial can be granted
ag't. Defend. tho' it may be granted for him. Stra 899. 12 W.
124. L. Ray. 63. 2 T. R. 484.

To this rule there are two exceptions. The first is when
the Defend. has been acquitted in consequence of a fraud
practised by himself. As if he has suborned witnesses, tam-
pered with the jury &c. 1 Show 336. 12 Mod 9. Stra 1238. Salk 646. 1 L. Ray 63. ^{Costs} 12 W. 124.

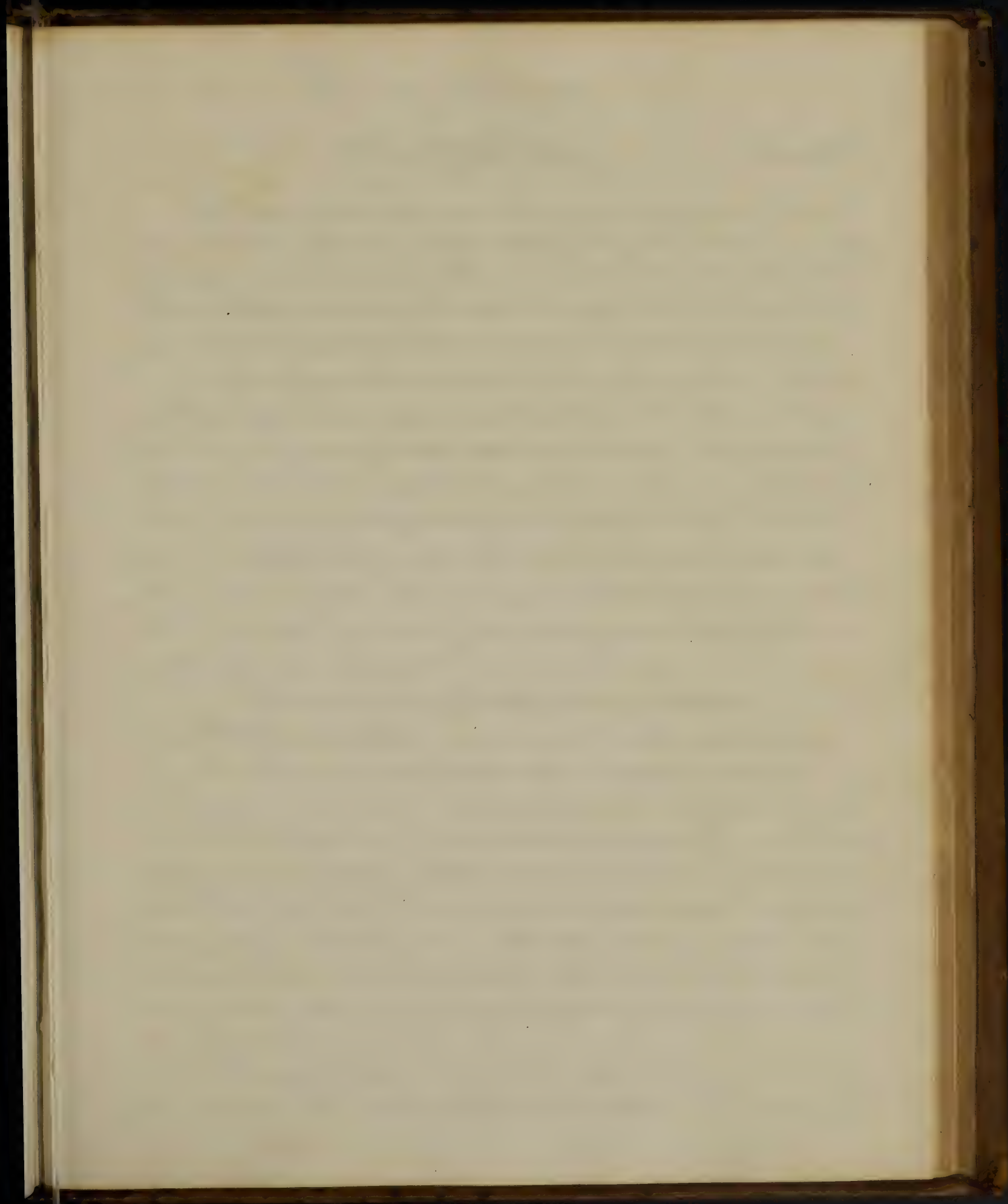
Second exception is, when the acquittal has been
obtained by the misdirection of the Judge or point of Law
a N. trial will be granted ag't. Defend. because he has been
substantially convicted of the fact. 4 T. R. 753. 5 T. R. 20.

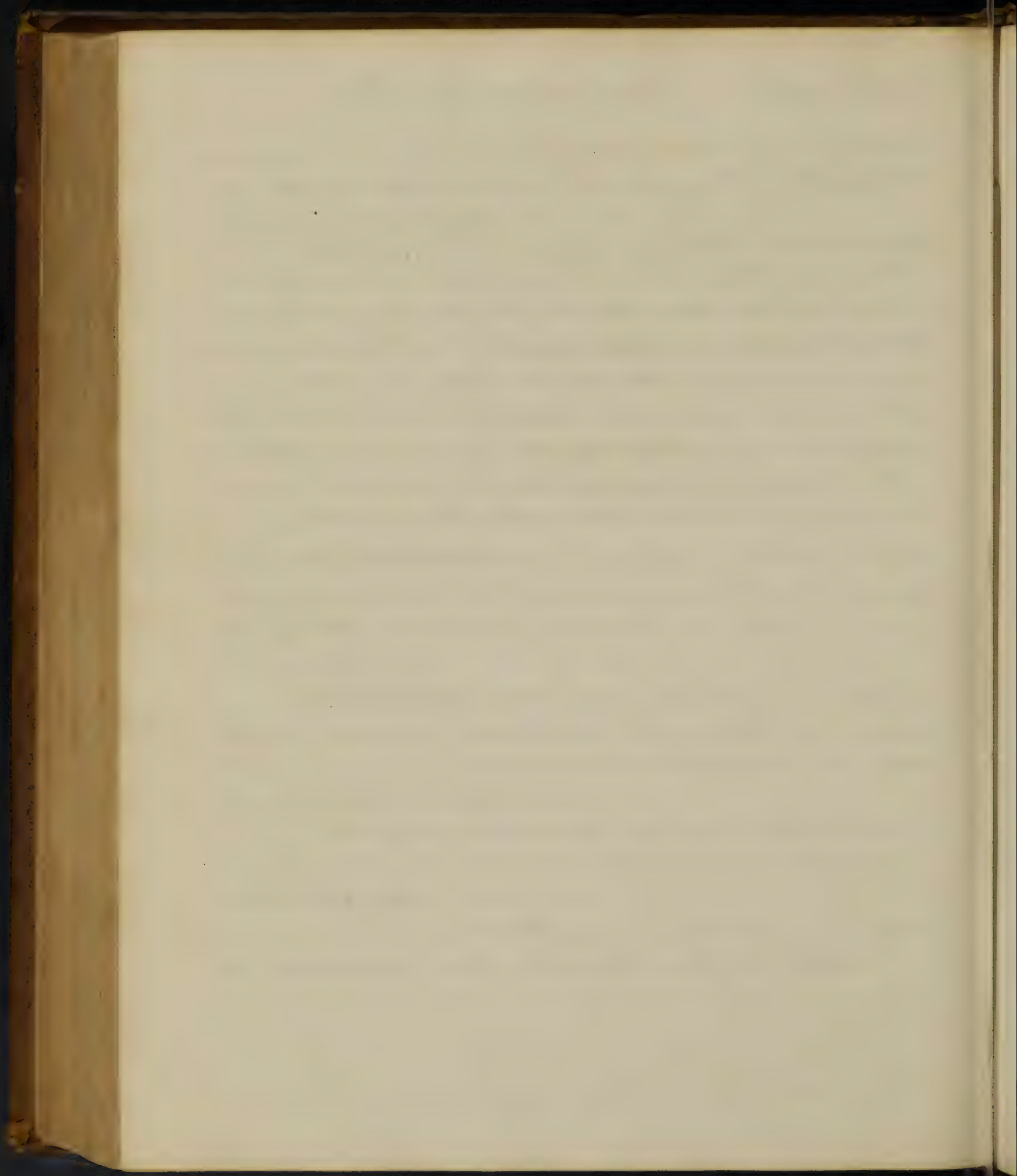
And in a Qui tam information a N. Trial can't
be granted for the civil part, unless in granting it a New
trial is granted for the Criminal part. Granting a new trial
in Eng. & Con. vacates the judgment tho' conditions may be im-
posed. 1 Root 86. 7.

As to costs — when upon granting a N. Trial. in
Eng. the costs are to abide the event of the suit. If the
party succeeds a second time, he shall have costs on both
trials. 8 T. R. 619. 3 D. 507.

But if the other party succeeds in the second tri-
al, he shall have costs on the second trial only. —
2 H. Bl. 639. 541.

In Con. it is the general tho' not universal rule,
that the whole costs abide the event of the suit.





Pleas and pleadings.

Writs of Error.

Lecture XXX.

The principles found in the English Books on Writs of Error must be the same every where, but the mode of carrying them into execution is different in different countries and different States. Ours differs materially from the English not but the principles as to reversals of judgments are the same.

A writ of Error is said to be a commission directed to the judges of a Superior Ct. to examine the record of an inferior Ct. and if error appears to reverse the judgment, if none appears to affirm it. A judgment on a writ of error cannot pass as a judgment in a common suit. It cannot pass on a default, for the Ct. must learn themselves from the record whether it is erroneous. If the Defens. fails to appear the Ct. cannot reverse the judgment of course & vice versa as in the case of a default.

There are two kinds of Writs of Error.

1. For Error in Law.
2. For Error in fact.

We shall be most conversant about the first for it is the most common and most important. By the way however, when they speak of an error in fact, they do not speak of any error as to the facts produced & found by the triers, as the fact what the Jury find that the Defens. admitted & promised, but they mean that there is some fact existing dehors the record, which makes the record erroneous, for no writ of error lies for a wrong judgment unless it appears on the record.

The error in Law complained of always appears on the record. The case is there stated upon the record, and

Pleas and pleadings.

Writs of Error.

the point determined must there appear as much as ^{the} whole case in a demurrer to a declaration. And in all cases it must appear on the record & no enquiry can be made out of it. By the way there are many things which don't appear on the record as a demurrer to a Declaration, which may be brought upon the record by a certain mode of proceeding to be mentioned hereafter. Every wrong opinion of the ^{of} Col. may be brought upon it.

This writ of error, (for error in Law) does not lie for any matter dehors the record. No enquiry can be made into any matter which is extrinsic of the record. So you see a writ of error may always be brought upon a judgment upon a demurrer. I am now considering the subject as tho' there was no appellate jurisdiction at all, and there are many cases where there is none.

A question of law may arise that does not appear on the record, and yet it may be placed upon it, if it is a writ of error will lie. As where there is a motion in arrest for the insufficiency of the Declaration, this lays the foundation for a writ of error. The Ct. admit or reject testimony often. It sends W. & offers W. as a witness. W. objects to him on the ground of interest, but the Ct. admit him, W. still thinks he was an interested witness and wishes the opinion of a Superior Ct. This is put upon the record by a bill of exceptions to the opinion of the Ct. stating that W. was offered: the grounds of the objection to him, & the fact of his admission by the Ct. and in this way may any other opinion of the Ct. as a question in giving a charge to the jury be placed upon the record by a bill of exceptions. and the Judge is bound to certify

Pleas and pleadings.

Writs of error.

by his office oath that this was the case, if it is statutorily, & if it is not, he must state it himself.

This writ of error lies for any interlocutory judgment of the Ct. tho' you will observe that it can never be brought until final judgment is rendered. As when the Ct. overrules a plea in abatement, & then the Defend. cannot bring a writ of error until after a trial on the merits, for there may be no use for it - but if on the trial he fails, he may then bring his writ of error upon the opinion of the Court in rendering judgment agt. his plea in abatement. (Note. 250. Bro. & 635. 11. 6034.)

So in an action of Account Defend. pleads in Bar. & the Ct. demurs. The Ct. renders judgment quod computat. & the writ of error now lies. The question goes to Auditors, and they award that the Defend. is in arrears. & then the Defend. may bring a writ of error on the judgment of Ct. as his plea in bar.

So in cases of partition no writ of error lies until the writ of partition issues & a return is made and judgment rendered by the Ct. upon it, for the partition may be according to his wishes.

It is no objection to a Defend. bringing a writ of error that he made no defence. Suppose a default when there is a fault in the declaration. As when an action of slander is brought for calling the plaintiff a willain. The Defend. suffers a default. He may bring a writ of error to reverse the judgment, for the Declaration is altogether insufficient.

So if the case had proceeded to trial, & he had made a defence, but had taken no exceptions to the defect in the declaration, he might bring a writ of error afterwards, if the

Pleas and pleadings.

Writs of Error.

declaration was substantially defective. I am not now speaking of defects cured by verdict, for then no writ of error lies. I am speaking of declarations which contain substantial defects, so that they would go out on a general demurrer or on a motion in arrest.

And this rule applies to other parts of the pleadings as well as to the declaration, for you see the traverse must be immaterial in case tried. As where Defend. pleads assumpsit, but does not state any in his plea, he only states a number of things, which merely amount to extortion. The plff. instead of demurring to traverse them & they are found in favor of Defend. - Now the plff. may reverse that judgment & this all appears upon the record.

There is a rule which is to be noticed, that what is pleaded in abatement & not pleaded is not subject of error, but if pleaded it is subject of error.

But there is this exception to it, for if the writ is utterly void so that no judgment can be rendered upon it in favor of the plff. the defect if not taken advantage of by plea in abatement is a subject of error. As if a feme. covert bring an action in her own name & states in her declaration that she is married, & no plea in abatement is put in & judgment is rendered in her favor, a writ of error will lie. So if the Ct. has no jurisdiction of the subject matter of dispute, a writ of error lies.

Another rule is to be observed. No person can bring a writ of error on a judgment except a party or privy to the record; & the privy must be one who has been injured by the judgment; as if the controversy is about land

Pleas and pleadings.

Writs of Error.

and the owner dies before a writ of error is brought, who can bring it? The person to whom the land descends after the owner's death. — by the heir if there has been no will. He must be first by that representation of the deceased, who is injured by it. If the controversy is about personal property, it must be first by the Exec^r or adm^r. If there is a devise of the land, he must bring the writ of error. 11 Mod. 747.

The principle extends further than mere representation. A sells to a farm of land & covenants the title. B. sues D. in judgment to recover it. They go into a course of pleading & the Ct. judges for that B. shall have the land. B. is injured by the judgment & he sues in A's defense. But A is such a privy that he may bring a writ of error and reverse this judgment. 11 Mod. 448.

This principle may be explained further. Suppose A sues B. to recover 40 acres of land and 50 £ damages. Suppose it goes in favor of B. now A. dies. who can bring a writ of error? Why clearly A's heirs. But he will not do it. Then D. may bring it who is the Exec^r for he is injured, for the suit is for personal as well as real property. And if B. the heir should settle with B. and give up all error in that judgment, then D. may bring a writ of error, for the damages are not released. 11 Mod. 558.

This principle goes still further. If there are more defendants than one, the general rule is that all must join in the writ of error. But suppose one is acquitted, shall the other defendants reverse it? Here arises a difficulty. Let's say B. C. and D. and D. is acquitted. B. & C. wish to reverse the judgment. D. objects to it, for he says you are bringing me into difficulty.

again - for the case may be so reversed that there may be another trial. The rule appears to be established that they have a right to reverse the judgment. I find no case in the books, but our Courts have permitted after reversal the case to go on only against the two. (See 210.)

There has been a question much litigated in the Courts which yet remains doubtful, viz. whether bail can bring a writ of error to reverse a judgment rendered against the principal. If there has been no case, I should suppose he could, for he is injured by the first judgment if it was erroneous, for there could be no judgment against him as bail. There are however a variety of authorities against this which say he cannot reverse it. But he is as much a party to the record as the vouchers mentioned before. I know of no modern case which settles the point. The principle always is that he is a witness, not that he is actually a party in name. See Co. 481. South. 447.

The proceedings in a reversal are different in different Courts. I will point out the English mode. In common cases, when a case is removed from an inferior to a superior Court, the record itself is carried up and not a transcript of it. As in a case removed from C. B. to B. B. and from this it follows that judgment is rendered in B. B. on this record as it ought to have been in C. B. and they issue execution upon it.

In Parliament it is not so. The record is not carried up (except in matters of form) only a transcript and if judgment is affirmed there the id. below issues execution on the judgment which the record. If it is reversed

Pleas and pleadings.

Writs of Error.

the Ct. below issue no writ but render judgment the other way, for Parliament never under the judge. Co. 341.

When the record is carried up a scire facias (as they call it) issues "ad audiendum errores". This is not usual, for the Def. or Error generally appears without notice. Co. 341.

In this country nothing more is done than to take out a writ 12 days before hand stating all the errors, and it is read to Defend. in error and it comes before the Court. as any other case does. This mode is pretty extensive, it is that of the National Court.

The Court of Exchequer in England is a Ct. instituted only to try errors. Writs of Error on suits originally commenced in B.R. are brought to this Court, and tried by the Barons of the Exchequer & Justices of C.B.

2. Errors in fact. I will now take notice of errors in fact.

This error in fact is something out of the record, as Coverture Infancy, and so in any other case where the Court cannot properly render judgment as they did by reason of some fact existing. As where Defend. lives out of the State, the Ct. are bound to continue the case one term. Suppose then Plff. should take judgment & enter the first term. A writ of Error lies on this judgment. And the same is true if the Defend. is a citizen of this State but is absent from the State at the time of serving the writ...

But suppose the fact is denied that he lived in another State, & plff. avers that the Defend. was & how

Pleas and pleadings.

Writs of Error.

in Con. at the time the suit was brought. How is the fact to be tried? Just like any other Question of fact, by a jury, and the fact must be put in issue like any other fact. The general issue to a writ of Error is "in matters not erratum". This you must not plead when you deny the error in fact, you must do it directly, as any other denial of a fact.

This writ of Error may be brought before the same Court that rendered the judgment. The judgment is not impeached by it, for the writ of error is grounded upon an error in fact not known to the Ct. This is a writ of error *coram vobis*, and the same Court may correct the mistakes.

I will now mention a general principle which is very important. It is this. When judgment is reversed the Court to render such a judgment as will restore the party to all he has lost. This is all that is asked for in a writ of error which in this respect puts on the appearance of a bill in Chancery. Suppose an writ of error is taken from C. Ct. to W. Ct. in A. brought an action agt. B. The Declaration was declared sufficient and judgment rendered that A recover 100 \$ of B. with his costs. B. brings a writ of error and prevails. What must B. recover? The principle is, he recovers all that he has lost. What has B. lost? This must be ascertained he recovers the amount upon the reversal, as if he had paid the money upon the execution, this must be restored, with interest from the time he paid it.

Pleas and pleadings.

Writs of Error.

When a judgment is reversed for Section XXXI.
plea in Error, who was plaintiff in the original action, the
general rule is, that the Ct. above must do the same judgment
that the Court below ought to have done. This is to be ob-
served however, that it is not always possible for the Ct.
to do this, for it may be out of their power to summon
a jury. In such a case the Ct. below must render the
judgment, which they ought to have rendered at first.
This I believe is the case with all the Supreme Court
of Errors in the United States. They can summon no jury,
can assess no damages. 2 Sand 256. 1 Salk 401. 403 & 413. 2 B2.
Couth 80. Bro Jac 206. Rose 774. 805. Bro C. 442.

This is the character also of the Court of Exche-
quer. Suppose in C.B. the Defend. pleads an abatement.
The writ is abated, a writ of error is taken to the B.R.
They overrule the plea & reverse the judgment by render-
ing a judgment of respondentus ouster, which the Court be-
low ought to have done. But suppose B.R. affirms the
judgment of C.B. and a writ of error is taken the Exche-
quer Chamber, & they reverse the judgment. Now how is
the case to be tried? It must go back to the Ct. from whence
it was brought. This Court of Exchequer resembles ex-
actly our Sup. Ct. of Errors. 1 Salk 413. 4. Moor 125.

I apprehend we have a method which is uniform
in the United States, not different in principle, but in the
mode of carrying it into execution. It is this - Suppose the
reversal is for Plea. They tell you in the Books that the
only judgment rendered is quod reversetur. Let it be reversed.
This they say is all the writs. But yet you see if the plaintiff

Plas and pleustings.

Writs of Error.

had recovered recovered money money out of the Defend, the Defl. would not be in statu quo by a mere judgment of reversal. He to be sure is so far restored that he may bring a bill of exchange. you money had received, but this is compelling a man to bring a bill to get his money.

Will further they call you a writ of restitution is to issue directing the party to restore to him the money. This is an Exr. in fact, yet it is not a part of the judgment, for that is only quod reversetur. What is to be done if the party refuse to pay? I know not, I suppose however the process is effective.

In this country, the judgment is not only a reversal, but a restoration of the money, which is a part of the judgment and exr. issues. If no money has been paid the judgment of reversal is the same as in Eng. except that Ireland has had waste.

However it seems according to the English principles and usages, if the money has not been paid over, but is in the hands of the sheriff, no writ of restitution issues but an order goes to the sheriff to pay it back. 1 Gal 588.

So if land was in controversy & the party had entered by force of a judgment which was reversed, the judgment would be quod ex. and a writ of restitution with an Exr. would immediately issue.

If the man who has thus gotten possession of the land sells it to a third person, no writ of restitution issues against the third person, but a *scire facias* issues to call him in. He has no title to the land. The great principle of reversal is, to put the party in the same

situation he would have been, had no judgment been reversed, which is to be done by the Supreme Ct. of Errors. How. 261. Cro. 6. 442. Carth. 253.

I am now to speak of judgments affirmed. Suppose a judgment is affirmed by Sup. Ct. of Errors, what is to be done? Do they issue an Exec.? No. the judgment is now declared to be perfectly good and so that Ct. you must go for your Exec. What then is rendered in Sup. Ct. of Errors? Why, that the judgment is affirmed. But here the Defens. in error says, I am injured, I have lost the interest of my money one year. Will how is he to get it? he must be restored to all that he has lost, and the Court of Errors will issue an Exec. for it. But there is another way. They may render judgment for damages & costs, & give Exec. for them. & not for costs on the writ of error, for in Com. by virtue of a Statute he cannot recover them. 2 Pars. 225. 4 Mod. 127.

Next. As to the Question whether a writ of Error is a superseas as to an Exec. A writ of error at the Com. Law is a superseas as to the Exec. after the writ of error has been allowed & delivered to the Clerk of Errors. This is given to him, that an opportunity may be given to every one to find out whether an Exec. can be issued up on their judgments and 8 days are allowed. We do the same here in another way, for where the writ of error is signed by the Judge, it is a superseas of the Exec. If the Exec. is in the hands of an officer, & he has had no notice, he may lay it without being guilty of a contempt. If he knows it, he would be guilty of a contempt.

That it stood at C. Law. They have now furnished a partial remedy to evils originating from the principle that a writ of error is a supersedeas from the time it issues. The evils were many. The property of the plaintiff may all be gone before the writ of error is determined & yet the Defendant may succeed he can get nothing by it. To prevent this evil they made a Statute, declaring that in certain cases a writ of error shall not be a supersedeas unless a bond was given to respond to the judgment. In Lon. this bond is extended to all cases. Now this bond will prevent any damage for the Court are bound to take a good bondsmen who may be sued & a recovery had of all damages, and collected out of him if the principal be unable to pay. The writ of error then must be a bondable one. In Eng. I observed, it was extended to certain cases. I wonder they did not make it universal. Barnes 376. 200. 205. 3 Ser. 112. 1 Saltk 321.

There is some uncertainty as it respects what follows. The authorities are contradictory. One thing seems certain - If the body of a man is arrested he is not actually lodged in jail, but as on the way there if the writ of error comes, he is to be discharged. This will always do where a Bond is given. But I doubt whether it applies in Eng. to those cases where bonds are not required, for it would be depriving a man of his security.

They tell you this is a proposition which is supported & contradicted by authorities, that if goods are taken by a Sheriff & he has once begun to execute, what he has once done stands good. This I cannot see

Pleas and pleadings.

Writs of Error.

to be necessary when bond is required. But when there is none I should think he ought to hold it. Barnes 212. 2 Roll 491.

Courts of Error in England. The C. Pleas is a Court of Error to reverse judgments of lts. below them. I have seen no case where a writ of error has been taken from this Court reversing or affirming a judgment now done by an inferior Ct. I am inclined therefore to think it is final, although a writ of error may now & ought to be taken from one of the inferior lts. to B. R. - A writ of error can be taken from C. B. to B. R. and from thence it can be carried to the Exchequer Chamber and from thence to Parliament. A judgment in B. R. upon principles of C. Law could always be carried directly to Parliament, or to the Exchequer Chamber and from thence to Parliament. A Stat. has given an election to go to either, but if they go to Exchequer Chamber it is final. 1 Stat. 346. 6 Geo. 380.

If the Exchequer Chamber affirms a judgment the Ct. below must issue Exec. - If they reverse for Defendant, or judgment given in B. R. it puts an end to the suit. If for Plaintiff the case must go back. As for refusing a witness who must now be admitted. If it were a demurrer or any interlocutory judgment it must go back.

Now for our mode of writs of error into C. B. Our Sup. Ct. is a Ct. of errors for all inferior Courts. We restore every one here to what he has lost. here in a different way. If in Sup. Ct. judgment is reversed in favour of Plaintiff then they suffer him to enter the case in C. B. as though it came there by appeal. The only judgment is, that the judgment below be reversed, and he enters his cause if he please.

Pleas and pleadings.

Writs of Error.

and he recovers all he has lost, if he succeeds on the merits. If he don't own ^{the} debt, intended. he should have no costs, & the Defend. has his costs taxed. But if he has actually paid the Defend. his costs in the Co. below, the Ct. will give him an ^{order} for them, for to them the defe. is not entitled. This they say is restoring the party to what he has lost. This is where Defe. gets his costs.

But judgment below was against Defend. and Defend. reverses the judge. What is he to recover? Why all that he has lost. But the plff. can enter now, but he would be a fool in this case, for his declaration has been declared by the Ct. to be insufficient. But there may be cases where it would be well to enter. Suppose the Cy. Ct. in a plea in abatement order an answer over. On the trial the Defend. offers a witness who was admitted. The plff. files a bill of exceptions and reverses the judgment. Now plff. may enter & proceed with his case for the reversal does not put an end to the case.

The Sup. Ct. have sometimes no jurisdiction of the case, unless they are made so by the reversal in which case they may be entered. But sometimes they have no jurisdiction over the subject matter, without regard to quantity or quality - over the case of ^{the} highway, a judgment on which subject has been reversed by Sup. Ct. It must go back to Cy. Ct. So in cases of complaints under the Statutes of Bastards.

Pleas and Pleadings.

Writs of Error.

Assignment of Errors.

The writ of Error begins with stating that such a case has been tried before such a Court, and state the whole record. Then the plaintiff says in rendering said judgment the Court erred and mistook the Law and then states the Error. The may state as many as he pleases. By the C. Law it is necessary to state errors only generally, but now according to their practice it is said they will not go to the hearing of particular errors unless they are assigned. It is the rule of Law unincumbered by a rule of C. to be this that the judges are bound to look into the record, & if they find any error to reverse the judgment. 5 Co. 37.

There is another rule to be noticed, that errors in fact and errors in Law can never be assigned in the same writ. They must be in distinct writs. The reason is not satisfactory. It is this - Matters of fact are to be tried by a jury, and matters of Law by the C. and therefore you cannot join them. But this is often done in a traverse to a part of the declaration, & a demurrer to the rest. But the rule is as above. 1 Rose 761. 1 Sid. 147. 10 Mod. 252. Yelv. 58. Carth. 338.

Suppose however a Defendant comes in, and does not deny the matter of fact, but pleads in abatement or irregularity. This admits the fact. The C. will now try it. It is all Law now. But if he intended to take advantage of the misjoinder of the two causes of error, he should have demurred for duplicity. 1 Saek 288. 2d Ray. 1005. Carth. 338.

It is a rule that in assigning errors, you cannot assign any thing as cause of error that contradicts

the record. If the record is that D^{ft}. is as a minor & appeared by J. S. his Guardian, you can make no averment that J. S. is not his Guardian, because it appears on record that he was. To any other thing that appears on the record, let it be what it will cannot be contradicted by an averment.

There is another rule which appears unintelligible when compared with the authorities. It is this. When a judgment is an advantage to a man, he cannot reverse it. But a reversal is often had when judgment was in favor of the plaintiff below. To be sure it must always appear on the record that some claim of his has gone against him & then it will not be in his favor, as when he declares upon 1000 £ & recovers 200 £.

So when there are several contracts declared upon, some of which are said to be usurious and some not. The plaintiff recovers upon part, but he may bring a writ of error on the judgment on the others, for the facts proved do not perhaps amount to usury. Carth 24. Cro. E. 609.

Whatever is pleadable in abatement is not subject of error if not pleaded. But if it was a point on which no judgment could be rendered, it is error whether pleaded in abatement or not. As if a feme covert is sued alone, and she does not plead it by way of abatement, it would be error to render judgment against her. The writ is abated de facto to the moment it is brought. Cro. E. 125.

Again - there are two tenants in common and one brings the suit. Now the Defendant may plead in abatement, but he does not, and judgment goes against him. There is no error in it. Salk 4.

Massive pleadings.

Writs of Error.

Sometimes a judgment is erroneous, but it is under such circumstances that it is in the party's power in whom favor it is by releasing the part which is erroneous to make the judgment good. As where the jury give more than the plff. demands. Now judgment on this verdict would be erroneous. But the plff. may release on the record the sum given over & above what is demanded and the judgment is good. This is often done especially in notes of hand, where the cases are continued a great time, & the interest exceeds the sum demanded. But in these cases the plff. might amend his writ on motion to the Ct. 10 Colls. Rule 784.

There is one thing arising out of this subject which has not been attempted to be done in Conn. - that the Ct. may themselves render a judgment contrary to the verdict, provided they do not increase it, so as to make it comport with the declaration. I see no objection to it. The authorities are this way & I have seen no modern case to the contrary. As where a suit is brought to recover two sums of money loaned. Usury is pleaded to both, and the Defend. in pleading usury to one states, that it was compounded & paid off. and as to the other omits to state compoundly. The jury bring in a verdict for plff. that he recover both sums in the two loans. There has been no case law upon one seen you will see. The verdict then is bad as it respects this, for the issue is immaterial. Now the plff. may release one of the sums & take judgment for the other. Cro. J. 104.

The General issue to a writ of error is "in manifest error & wrong" - and it is all the defence that can be pleaded except it is a matter of fact which you deny, or in which you

have something which is subsequent to the judgment as a rehearal of all errors on suits. 11 Mod. 788.

Another general rule is this, that when there is a judgment agt several, if it is erroneous as to one, it is erroneous as to all. They say the judgment is entire, and must be wholly good or bad. Our practice is different. In an action of assault & battery is brought vs. A. B. & C. C. was an Infant & did not appear by Guardian. The judgment vs. all is erroneous. Upon English principles it could not be reversed as agt C. and stand good agt A & B. With us it can be. By our mode of proceeding there is no injury done. There is no contribution between defendants. A and B. can not complain if C. gets clear, for they could not compel C. to pay any thing, if the plff. should collect his Exp. out of them or one of them. Lord S. 289. 11 Mod. 786.

But where there are two distinct judgments complained of by a writ of Error, in England one may be reversed & the other stand good. As in an action of Account the judgment is quoad computat. - but in the report of the Auditors there is a manifest error. A writ of Error is brought to reverse these judgments. One may be reversed & the other stand good. - So in the case of an Executor who is sued and judgment obtained, and Exec. goes out wth the property of the testator in his hands. Then a scire facias issues, or proceeding on which there is error. - Then Executor brings a writ of Error to reverse these judgments. One may be reversed & the other stand. 3 Co. 32.

One thing out of its order. There is an instance in which the Court of Exchequer exercise the power of

rendering judgment themselves. But it is in a case where there are no facts to be proved. It was only a Question of Law arising upon a special verdict. I do not see that this is any infringement of principle, and in similar cases our Ct. of Errors have done the same thing. 6a. 319.

One thing more. That the person recovering the judgment shall be restored to all that he has lost, is a principle never to be infringed upon. But how is he to be restored? A recovery of B. takes out Exec^{ts} & collects the money by the sale of a pair of Horses at the post. Now B. brings a writ of Error & reverses the judgment. What is B. to be restored to? The horses? They were sold to C. at an auction. Can he sue C. in Trover? No. He must in such a case receive a judgment to recover out of C. the value of the horses. He cannot sue the Sheriff neither who sold them. He took the property before the reversal and he was bound to execute the process. The principle above which relates to C. is for his protection, & is a principle of policy altogether.

Now suppose in England A. had taken out an Elegit and had the horses appraised off to him. Then B. reverses the judgment while the horses are in A's possession and are his property. B. can recover the Horses out of A. and according to the modern idea, he would not be a trespasser to go to the Stable and take them. If a town of goods has been sold under an Exec^{ts} and B. reverses the judgment the vendor will hold it. But if it was returned so that it was C's property, B. would have it on the reversal. 8 Co. 14. 14 d. 6a. 278. 11 Co. 778. 12 Co. 108.

Pleas and pleadings.

Writs of Error.

There has been a great Question, where we have a mode in the Engl Land of appraising Land in fee under an Ex. This is unknown to Common Law. Now suppose A recovers of B and buys upon Land and has it appraised to him & then sells it. Afterwards B. reverses the judgment. Now can C. hold the Land ag^t B. A has no title to the Land, because the judgment was reversed, and the sale was a private one, not under the sanction of the Law, as by vendue in market overt, by the Sheriff, or by him at the post, under the Ex. Our Courts have determined that C. must loose the Land, and he is no worse a situation than he would have been, had he bought another parcel of Land, the title to which was defective.

There is another case. An action is brought ag^t the Sheriff for an Escape. Before plea pleaded the judgment ag^t the escaper is reversed. Sheriff pleads null tibi reced and it will ^{avail} ~~and~~ him...

Supplement. Pleas & Pleadings.

(Note A.) During the time of the Commonwealth pleadings were in English. (1. Page of the title.)

(Note B.) There is but one exception to this rule, and that is the following. It is true the first or major proposition is not generally expressed in terms at length, - but (the exception) when a particular custom is pleaded, it must be so expressed. The reason is, the Court are not supposed to be acquainted with particular customs, & therefore the rule is as to the Major proposition, that it is to be decided by an issue in Law, yet in this case the existence of the custom is matter of fact. It is to be proved & tried as a matter of fact & as such the jury are find the verdict.

(Note C.) When I speak of stating conclusions from facts, it is necessary to illustrate. These conclusions are always stated as facts. e.g. in declaring upon an implied assumpsit the plaintiff states the indebtedness, which is a real fact, and he goes on further & states a promise, which is not a fact, but a conclusion from the fact of indebtedness. The promise itself exists only by fiction & presumption of Law.

(Note D.) This general rule that all pleas should be direct, not any commentaries to, requires a qualification. I shall treat of it under the head of "Declaration." According to your rule, the word "whereas" is not sufficiently positive, but there are cases where it has been held sufficiently positive. The rule in modern times has become somewhat relaxed.

Supplement. Pleas and pleadings.

(Note C.) The reason of the rule as respects the necessity of alleging time of place is somewhat different. The reason why he must allege time is to bind forward certainly upon the record & prevent looseness, for if it is not stated the contract may have run an indefinite length of time & a right of recovery be barred by the Stat. Limitations. The place must be alleged, because anciently every issuable fact must be tried not by a jury not only of the County, but of the neighbourhood where the cause of action arose. It is true an additional reason was that there might be certainty, but the governing reason is as above with respect to the Jury. 4 B. Com. Pl. 70. 83. 4 Dares 58. 57. 3 B. C. 6. 384. 5. Com. 92 "Amendm." B. 1. This rule is relaxed in modern times, for the jury are not taken from the neighbourhood, but from the county at large.

(Note F.) General Estates in "Fee Simple" may be generally alleged, i.e. the party pleading such title is not bound to show how or when it commenced. But contra when any lease is taken than fee simple is pleaded, the time & manner of its commencement must be pleaded & alleged. It is then necessary in alleging a fee simple, if the party alleges that he is so possessed in fee. The reason is, Estates in fee simple may commence by a mere matter of fact, by a tort continued, as by disseisin. This then is matter of fact. But contra, a particular estate always commences in a manner, which involves a matter of Law, as by fine, recovery, deeds, devise &c. which are matters of Law, & the Court in this case are to judge. The former, i.e. a fee simple estate commences by matter of fact, & of this the jury are to judge. Dares 47. L. Ray. 333. 3. Wils. 72.

Supplement. Pleas and Pleadings.

(c. Note g.) So also if when plff. sues for an entire or indivisible thing, & himself shows that he has no title, & to part the Decla is bad. This rule is not universal, for the distinctions see, 1 Saund 285. b. 11 Co 45.

(c. Note h.) And 4th. that the Defend may be enabled to plead the judgment to any subsequent action not for the same cause. This reason is in statu omnium.

(c. Note i.) There is said to be an Exception, this rule in actions brought on Bills of Exchange vs. the Drawer and actions on Promissory Notes vs. the maker; because as I do. Holl says the drawing of the Bill, or executing the note is of itself an actual promise to pay, & therefore none need be alleged substantively, but merely a recital of the facts. If one might be permitted to reason upon this rule, says Mr Gould, I sh^d say it is not founded on principle. It does not mean it is not Law, for it is settled. But established on the whim of a great man. I cannot see the difference between this & other cases of Assumpsit, & how can an assumpsit be raised, when there is nothing more appearing than the evidence of it? Balk 12.8. Str 224 L. Ray 538. W. v. B. of Ex. 196. 2 New R. 63 notes 4. M. v. B. 451.

(c. Note k.) If there are 2 or more persons jointly entitled to an action, as joint obligees, & one of them dies, his Executors join in the action, with the survivors, because as Law the whole right of recovery survives to the survivors. 11 W. 3. 445. 1 East 497.

Supplement. Pleas and pleadings.

(Note C.) When a Declaration is demurred to, for a misjoinder of counts the Def. can't enter a Nolle prosequi as to one & thus destroy the effect of his misjoinder. Now he can't by his own act thus defeat the Demurrer. He seems to be the practice in Eng. that the Jiff. may enter a Nolle prosequi before a Demurrer. By entering it thus, he withdraws from the record the defect, & his Declaration is made good without injury to y^e Defend^t. 17th B.C. 109. & 11th B.C. 360. & 12th B.C. 285. & 13th B.C. 285.

(Note M.) An action of Debt for y^e recovery of a penalty of a Stat. can't be brought in a foreign Country. So too where y^e subject of y^e action is local, the action itself is local, tho it is in form a personal action. As in y^e action of quare clausum frigit, this is a personal action, but the Trespass is committed on a local subject. So also in an action of Debt on Covenant vs. the assignee of a Lease, the action is local, & yet y^e action of debt on Covenant is transitory. It is local because the contract is real, & runs with y^e Land. It may be proved to be local by deductions - 1. The Land is local, 2. The Contract as between the Assignor and Assignee is local because it runs with y^e Land, 3. and therefore y^e action itself is local. - But by way of distinction, the action of debt on Covenant as vs. the Lessee of y^e Land is not local. The reason is the Lessee's liability to the Lessor is founded upon priority of Contract, whereas in the former case the assignee's liability is founded upon priority of Estate and there is no actual Contract between the Assignee & Lessor. - 2d East 574. 580. & 12th B.C. 241. 67th B.C. 241. & 13th B.C. 193.

Supplement. Pleas and pleadings.

Rule W. This rule of the C. D. that an Alien can maintain no action Real or mixed is varied by the local Laws of some of the States. In all those where he is allowed to hold real Estate he may maintain the action. In some of the States there are Laws enabling Aliens generally to hold real Estate. See the American Editⁿ of the *Encyclopædia* title Aliens. By a Stat. of the U. S. of children of our Citizens the born abroad, are natural born & not aliens. This is a deviation from y^e C. D. rule, for by the C. D. children born out of y^e realm altho of naturalized parents were aliens. So also by a Stat. of y^e U. S. the children of persons naturalized here are entitled to y^e same rights, if they were under age at y^e time of their parents naturalization, & at that time resident within y^e U. S. But this privilege is not communicated to the adult children of y^e naturalized parents, or to those under age who are resident in a foreign Country. Stat. U. S. Vol. 6. p. 99. *Encyclop. supra*.

Rule O. So a supposition that the p^l was known & acted by the Name in which he sued, as well as by the name mentioned in y^e Defences, then, is y^e 000. 1 East 542.

(Rule P.) There is a material distinction between taking advantage of a variance in the 2^d & 3^d ways. In the 2^d way (i.e. in evidence as per y^e Rule of y^e Judge on one side of y^e bond, & on the other y^e Jury, & thus proves it not his act. & does y^e Jury must find for him. In y^e 3^d way the objection is made to the Ct. that it sh^d not be given in evidence, & they must reject it.

Supplement. Pleas and pleadings.

(Note 9.) But issues in fact may be taken upon the pleadings which follow ye declaration. But these are rather "Issues" & not General or Special Issues. E.g. Suppose the plea in Bar is traversed, this will be called an "Issue", & not the General or a Special Issue.

(Note 10.) But the proposition that such pleading is cured by verdict, requires qualification. It is said a negative proposition is cured by verdict. The meaning is, if ye parties go to trial upon such issue, the verdict cures ye defect; tho' it be that ye defect is not thus cured, if ye verdict is found for ye party who tendered such issue, tho' if found for ye opposite party it is cured. E.g. The Def. pleads a release of ye Cause of action since ye date of ye writ. The Pl. traverses his release since the date &c, and thus leaves ye implication of his having released before ye date &c. Now if verdict is found for ye Pl. it only finds that he has not released since the date of the writ but leaves the implication that he did it before, & therefore ye defect is not cured by verdict. But Contra, Suppose ye verdict on such issue is found for ye Def. The verdict then finds that the Pl. has released since ye date &c. The defence then is as good as if ye Pl. had executed the release before ye date &c. & it had been so found on trial; therefore the defect in this latter case is cured. The Stat. of Edw. however has rendered such pleading ill in Special Demurrer only.

(Note 11.) In the other hand, plea which form a complete answer issue must conclude to ye Country. For if after an issue is found he may conclude with a verification, the adverse party would have the same right.

Supplement. Pleas & pleadings.

might reply, over & also conclude with a verification
to on in infinitum. N. Bay. 98. b. 11. 58. 308. 3. 309. Again
When Def^r alleges distinct matters of defence to different parts
of the Declaration, he may conclude each part with a
verification, or he may conclude y^e whole with one.
Thus if to an action of Assumpsit for 100^l the Def^r should
plead payment, as to 50^l & accord & satisfaction as to the
other 50^l, he may conclude each branch of his defence
with a verification, or the whole defence with one...
1 L. and 338. 329. 2alk 312. 298. b. 11. 43.

(Note, t.) The same rule holds as to all the subsequent pleadings. If y^e p^{ty} makes an entire answer to the whole plea in Bar leaving in part a material part unanswered, his replication is ill intols. 1st R. 40. 1 Sess 28. H. 2. 337. 2d S. 127. (Ch. B. y^e above inserted by mistake. See in y^e body of y^e little y^e next page from where it is taken. J. H.)

(Note W.) A Defend. need not allege in his plea more than what prima facie amounts to a sufficient answer to the Declaration. Clearly then he need not negative the possible answers the plff. may give to his plea. 2. Roq.^d 400. 2 Wilk. 100. 1 Sand 248.

(Not. v.) Pleas in Bar regularly begin with an actionem non, i.e. the wife begins by saying the peffor got not to have his action. This is the common form. They may begin with an onerari non debet. When the plea shows there was never a cause of action. The reason is obvious. In

Supplement. *Mass & Madings.*

the one case he says there never was a cause of action and are now deb't. In the other case he admits there once was a cause of action but that for some reason it is now debarred, action now, now. *Salk 516. Laws 139.*

(*Vol. 10.*) When a Traverse is pleaded by special matter of inducement, *Mr. James* calls it a special Traverse. From certain he must be mistaken. *Laws 116. 17. 18. 121. 149.* *Chancery* conceives the extent of the Traverse decides its character, & this only. If the Traverse denies all that is alleged on the other side it is a general traverse. On the other hand, if it goes to only a part of the allegations it is special.

(*Vol. 12.*) The General Traverse "*De injuria sua pro priis absque tali causa*," is appropriately adapted to answer matter of excuse. It is however generally a good answer to a justification, where justification consists of mere fact & does not contain matter of record right, title or interest. *Laws 154. 5. 156. 866. 67. Com. Dig. Traverse 20. 21.* The reason why the *absque tali causa* is improper where there is matter of record is that this sort of Traverse is wholly inappropriate to the denial of such facts. But the replications *de injuria* &c. concluding with an *absque tali causa* is not proper where part of the plea consists of matter of record &c. yet in such cases the ple't may reply with *de injuria sua* &c. and then conclude with a special Traverse as to any particular point of the record right &c. Thus he avoids the inappropriateness of the General Traverse, *absque tali causa*. Again the general traverse *de injuria* &c.

Supplement. Pleas and pleadings.

may be replied in its general form where the matter of record title &c is alleged only by way of inducement. For where this is the case the inducement, otherwise the general traverse does not make it a part of the issue. Com Dig. Plead. 20. 21. Dams 156. 8 Co 67. 11 Binn 320.

Vote 27. I find a later case decided in Mass. where it was holden that Defendants cannot sever in their pleas except in actions sounding in Tort; not in those sounding in Contract. The reason assigned is if two or more are sued on Contract they may join in their defence with safety, for if it is not found vs both neither of them can be subjected. But suppose (say T. & C.) they cant agree as to the plea proper to be pleaded in such case - Suppose the Law will never compel ye. Defendants to make joint answers. One or the other must leave his own defence & join in that of the other, and who shall determine which? It is by the power of the Ct to do it. And it is manifestly unreasonable that one Defendant sh. be compelled to join with his Co Defe. in a defence which in his opinion is a futile one. It certainly can not be in those cases where ye. Defendants are unwilling to join. - 5 Mass R. 444.

(Vote 27.) But I wish to have you distinctly observe that this is by virtue of y. Stat. 27. Ez. Ch. 16. We find the rule laid down by some writers as if this was a rule of C. Law. But it is not so, for at C. Law advantage could be taken of such defect by General Demurrer.

Supplement. Pleas and pleadings.

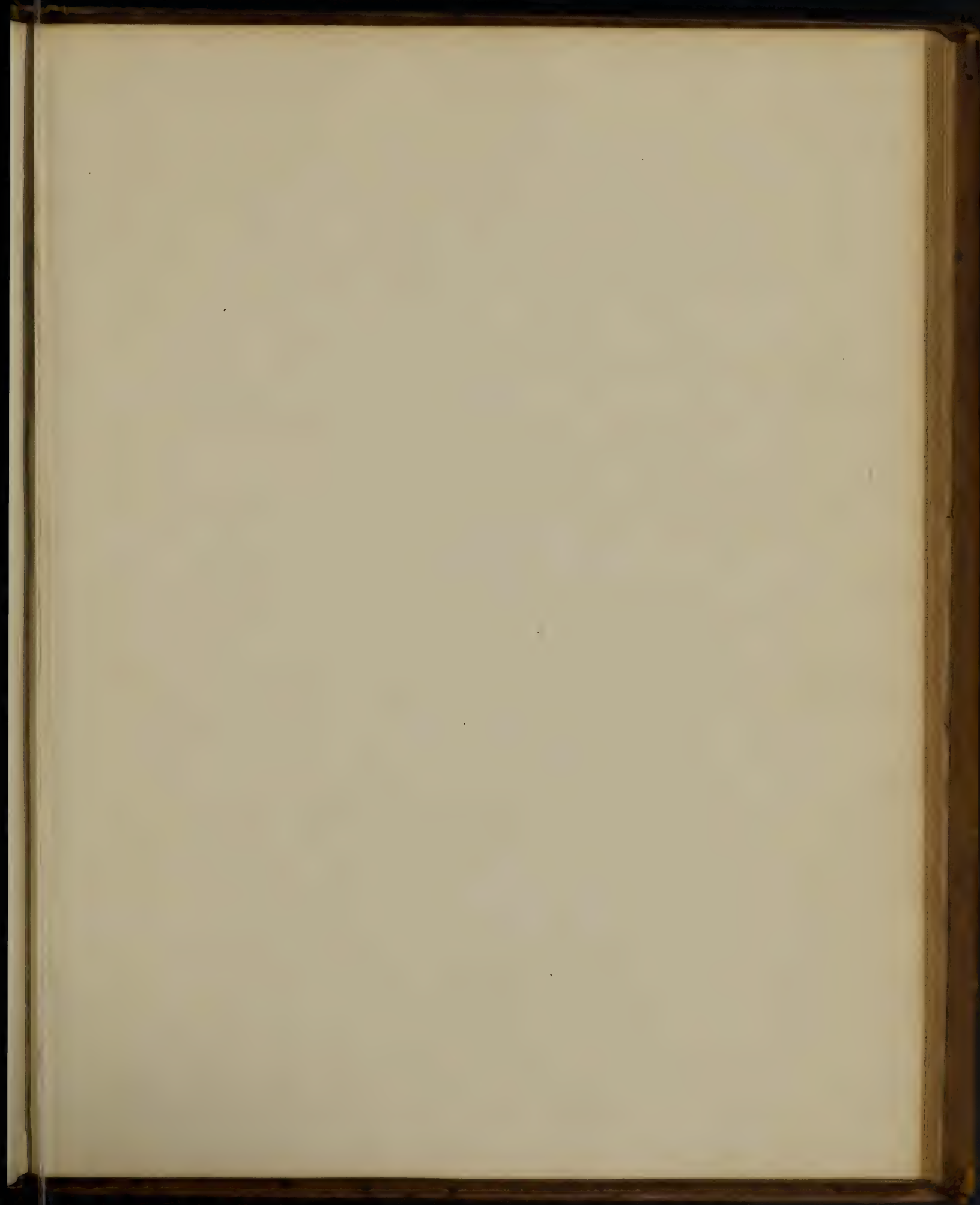
(Note a.a.) And it has lately been determined by our Court of Errors that the party's own oath is not admissible to prove the fact of loss. Columan v. Woodcock. 110. 1810. A case was there cited much relied upon in your argument by the opposite counsel from 2 Str. 1106. But this case is not *ad idem*. In that case the party was allowed to testify, but it was upon a mere question of practice.

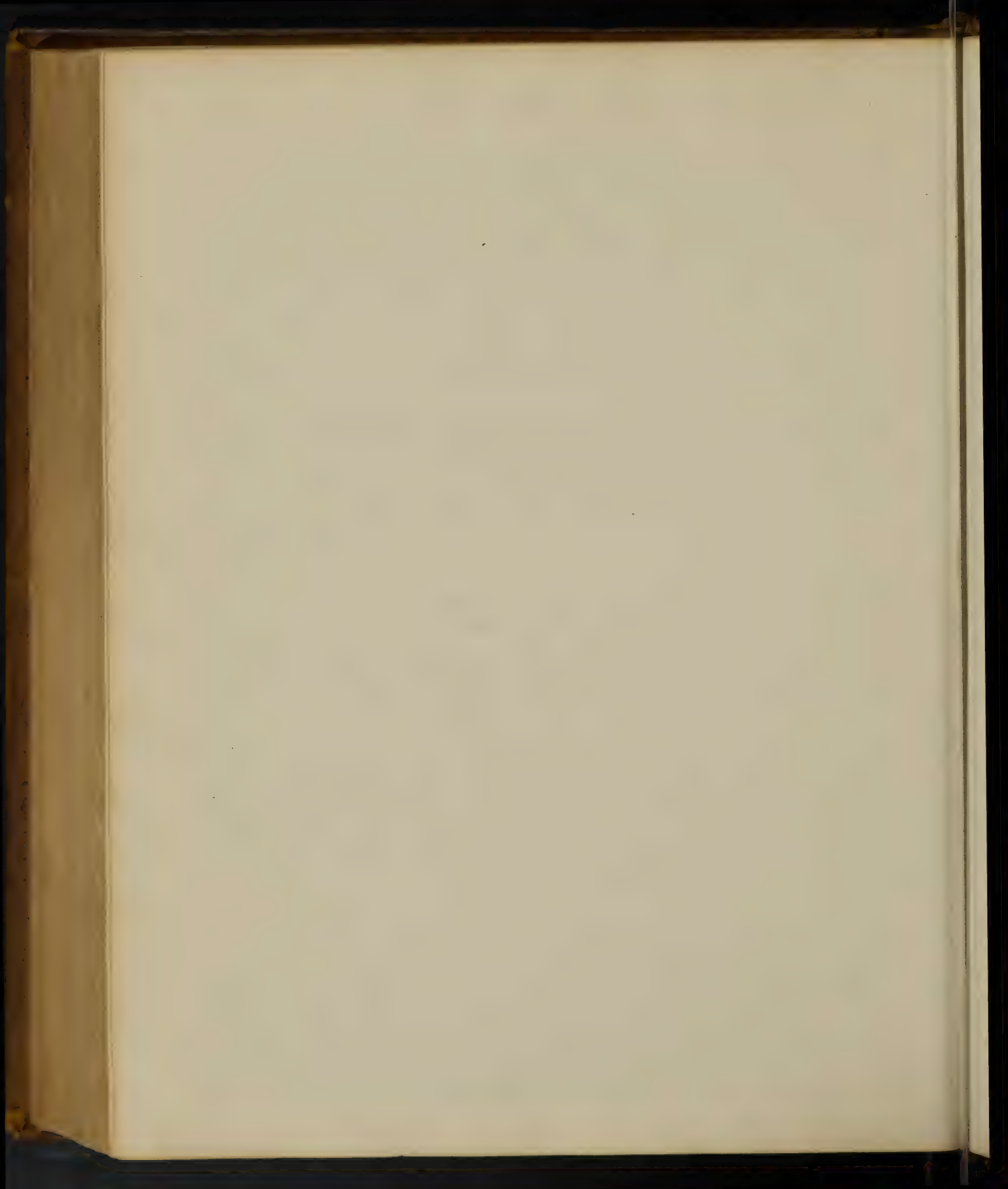
(Note b.b.) But to take advantage of the error the party craving a jury must enter his prayer upon the record, otherwise the request refusal will not appear & Error cannot be predicated upon it. -

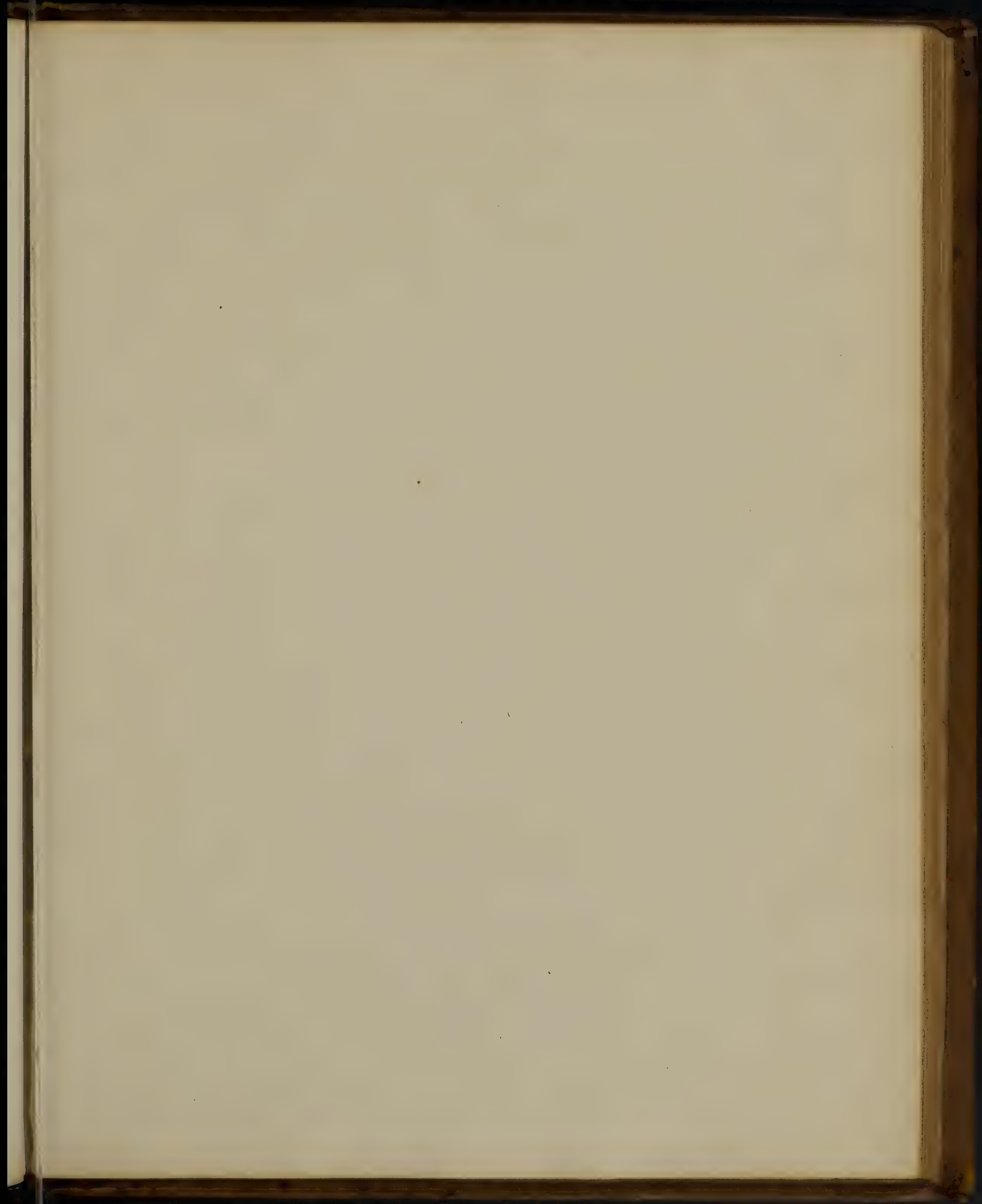
(Note c.c.) You will perceive from the forms that it is usual in England to conclude a Plea with a verification. This answers no good purpose however for the Plea concludes off pleadings. See 172. 1 Sec. 24. & 110. 12.

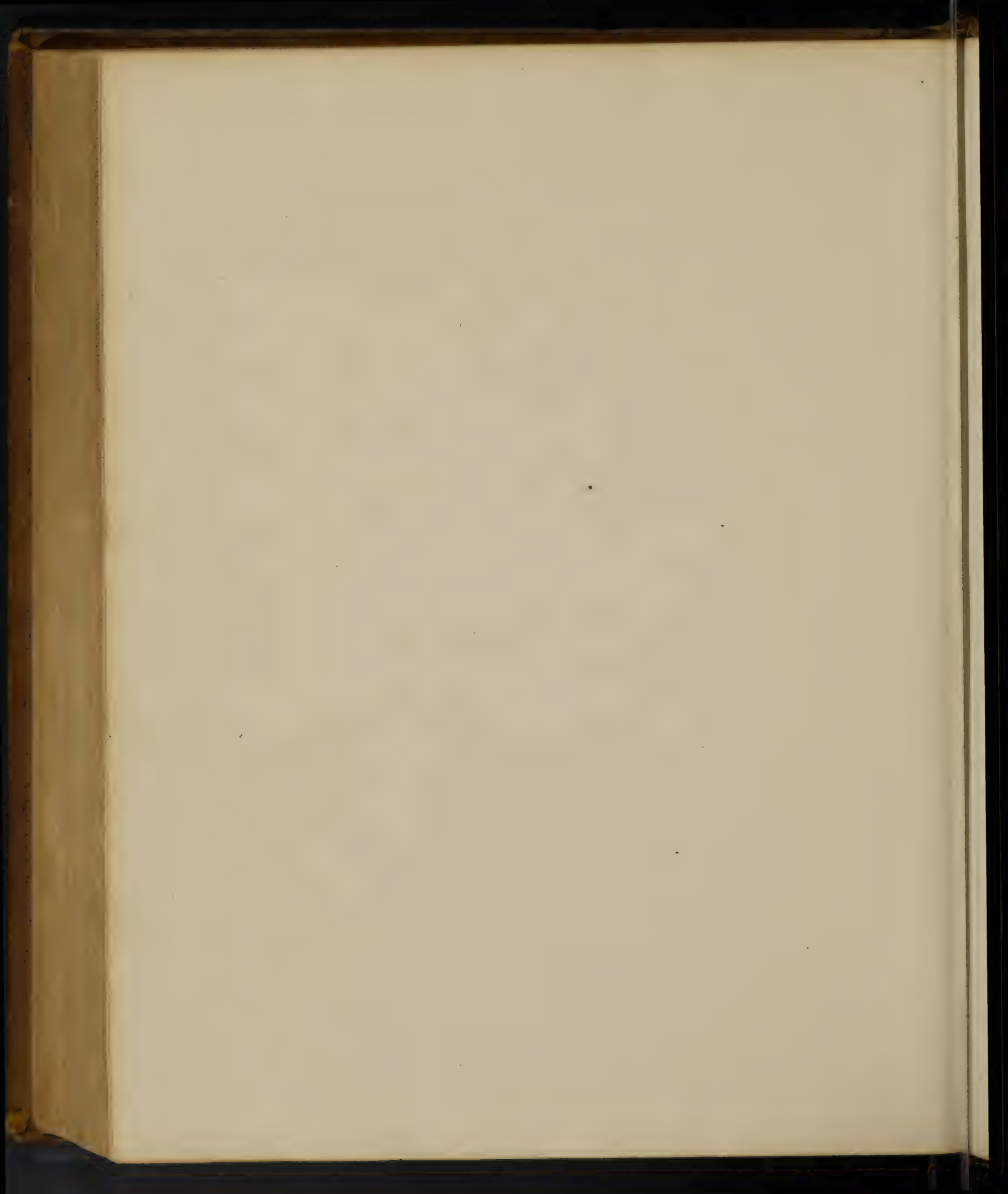
(Note d.d.) The Stat. of Edw. does not extend to assumpsits, presentments, indictments or actions on penal Statutes. As to them the rule remains as at C. Law. For all assumpsits in them may be reached by Genl. Demurrer. (Comp. p. 10. 97.)

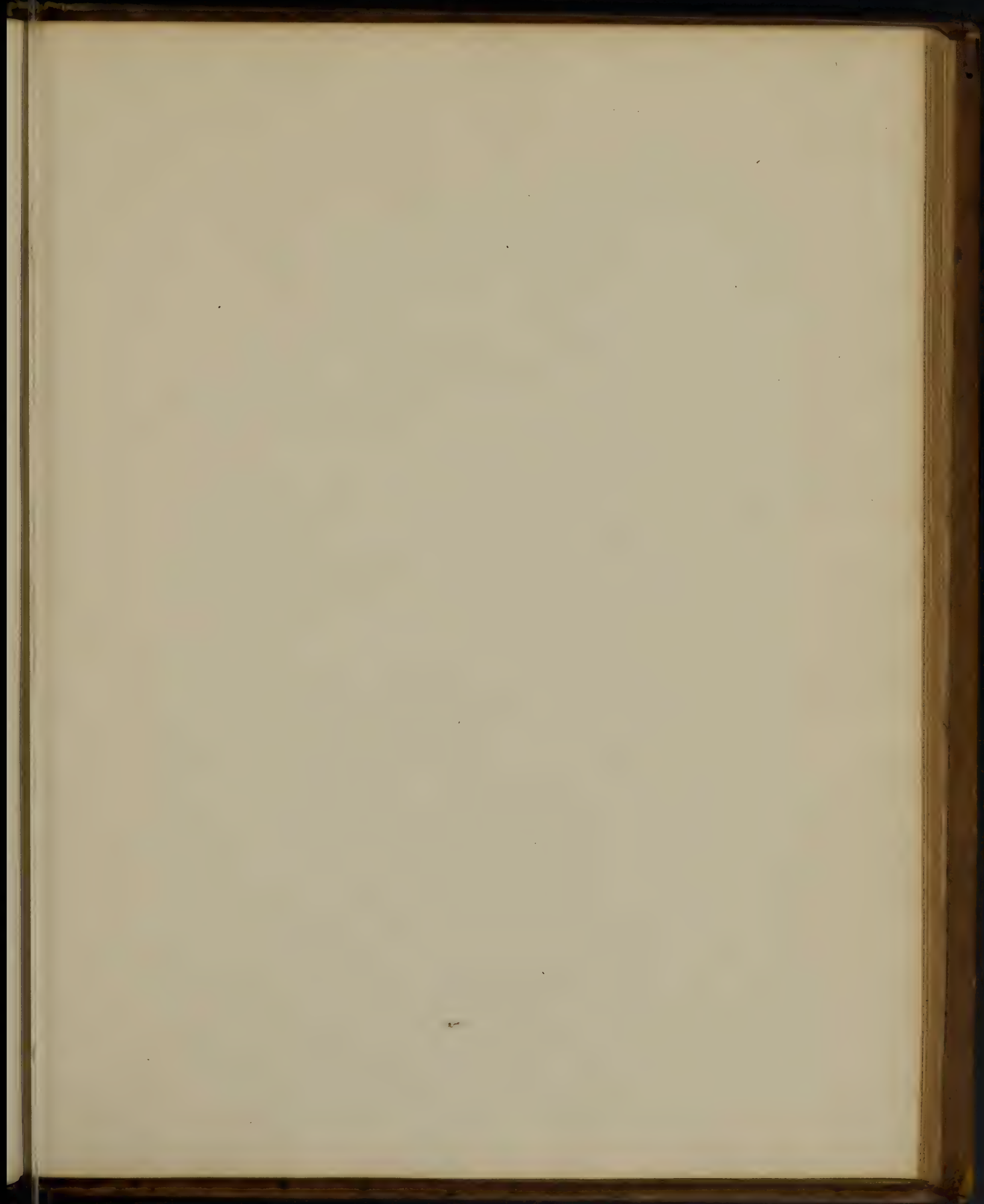
(Note e.e.) Thus if a bill on obligation, payable on a before a certain day, the defendant pleads payment before the day, & the issue is found for the plaintiff, it is immaterial & he cannot have judgment. But if he avers & proves the payment after the day, it is material & decisive. In the former case the fact of payment before the day wholly discharges him from his liability, & the plea is without cause of action.

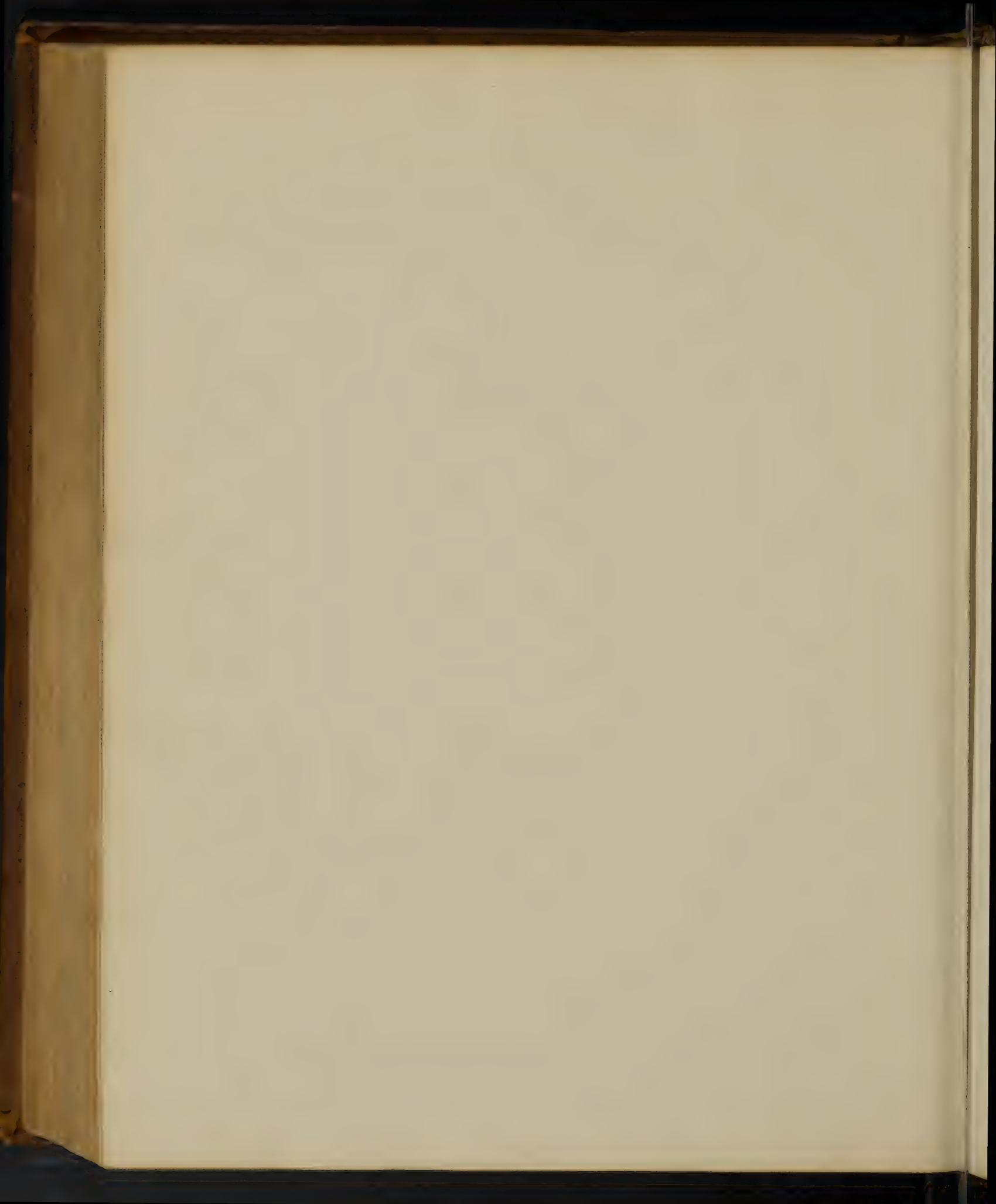


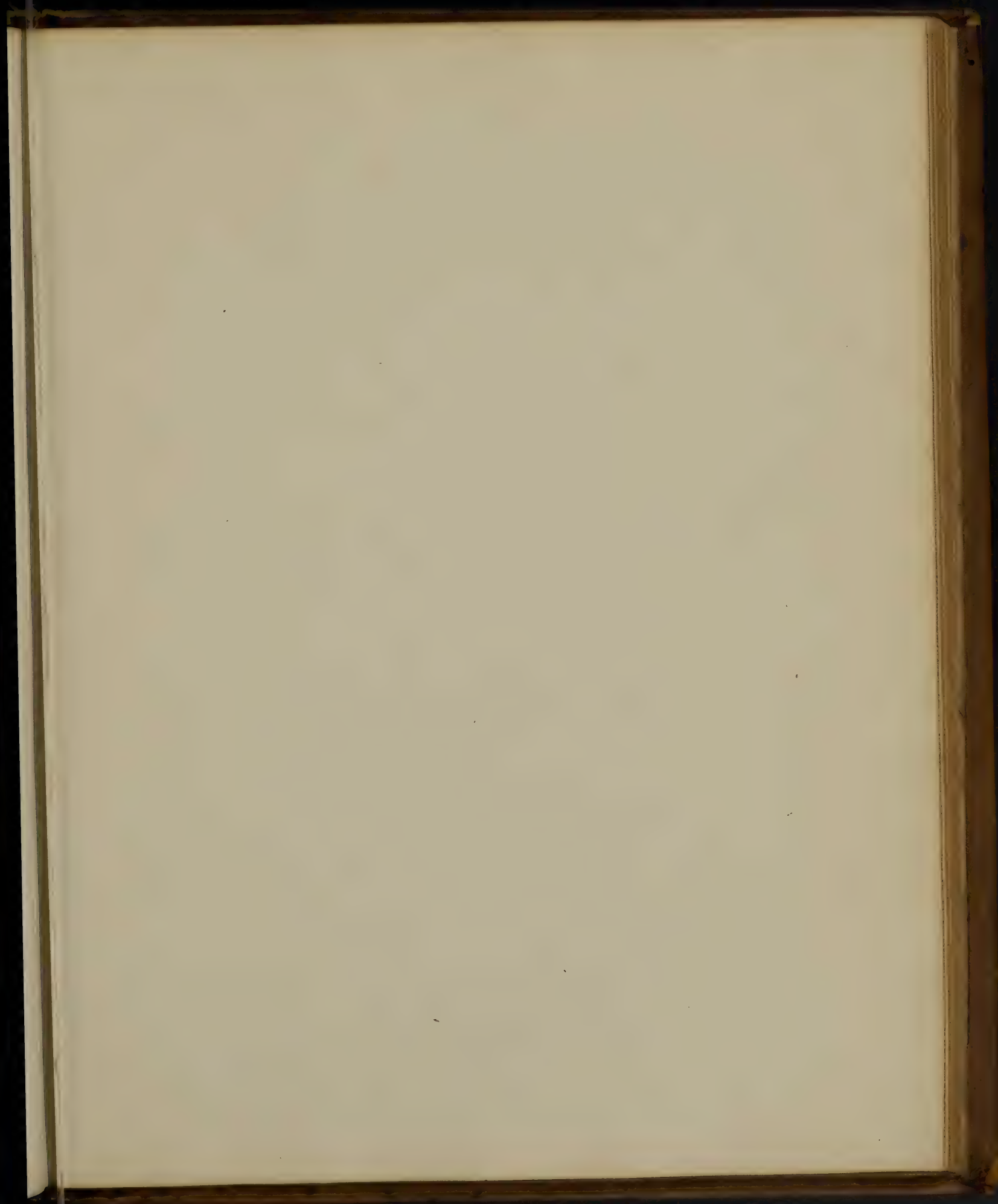


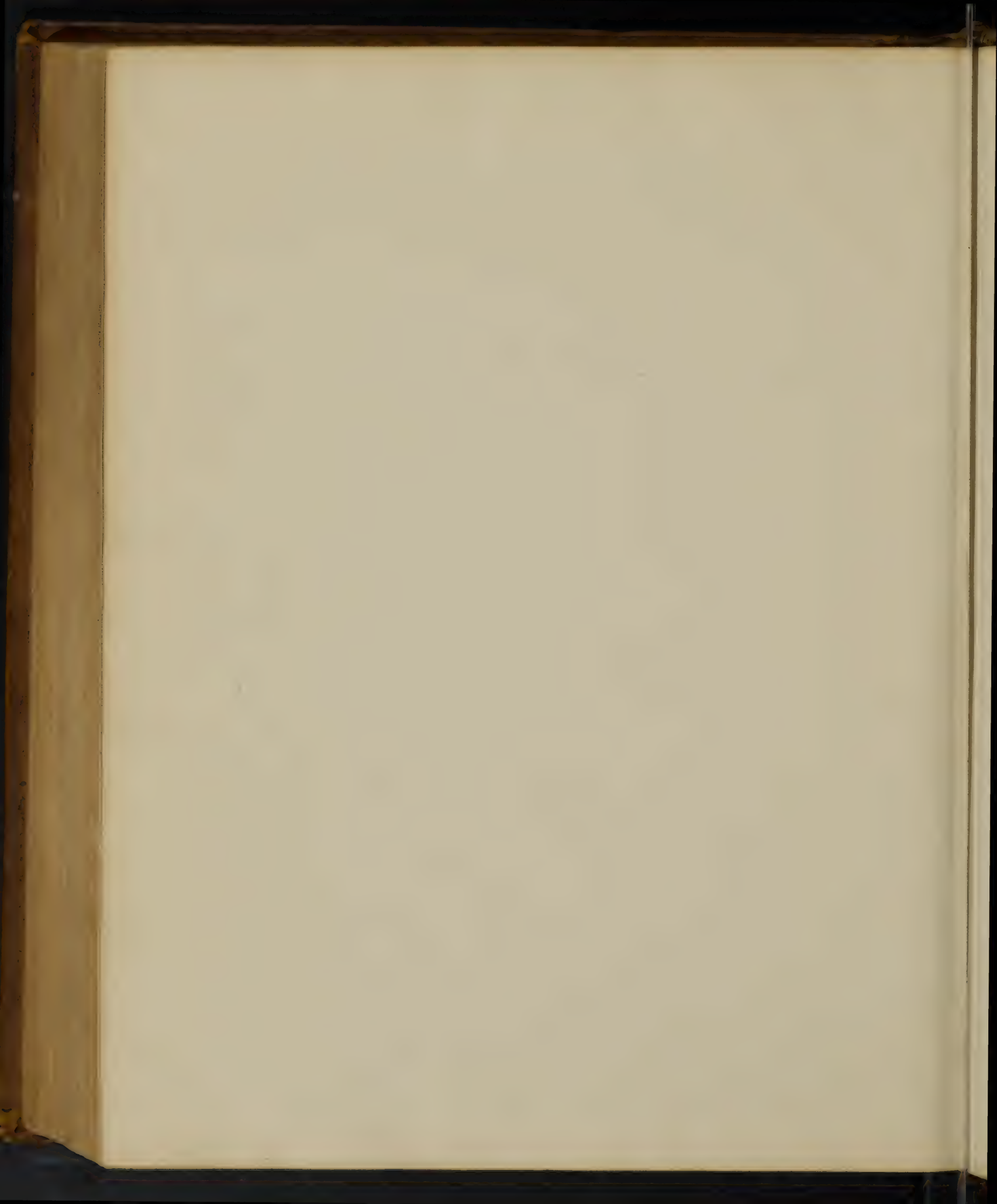


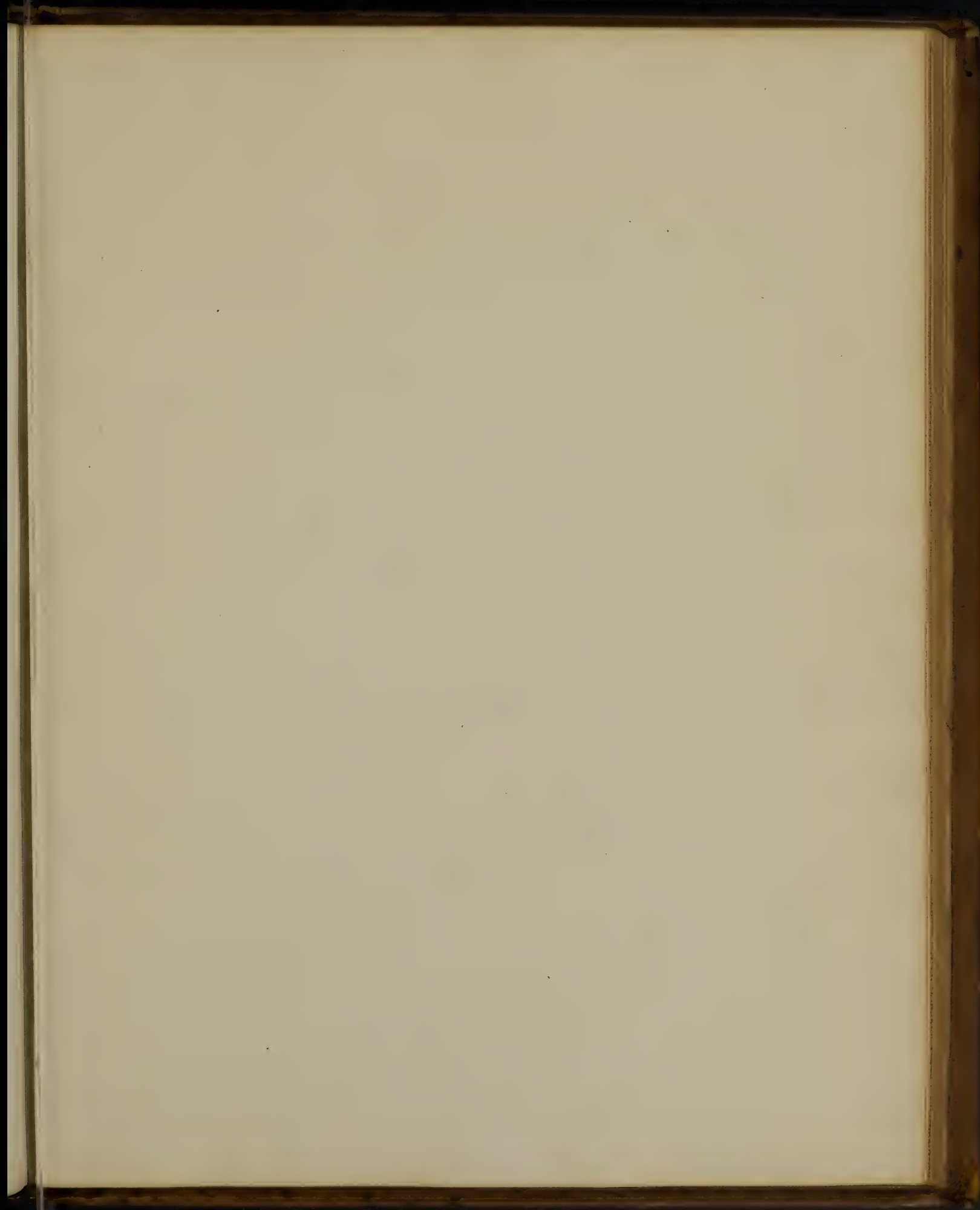


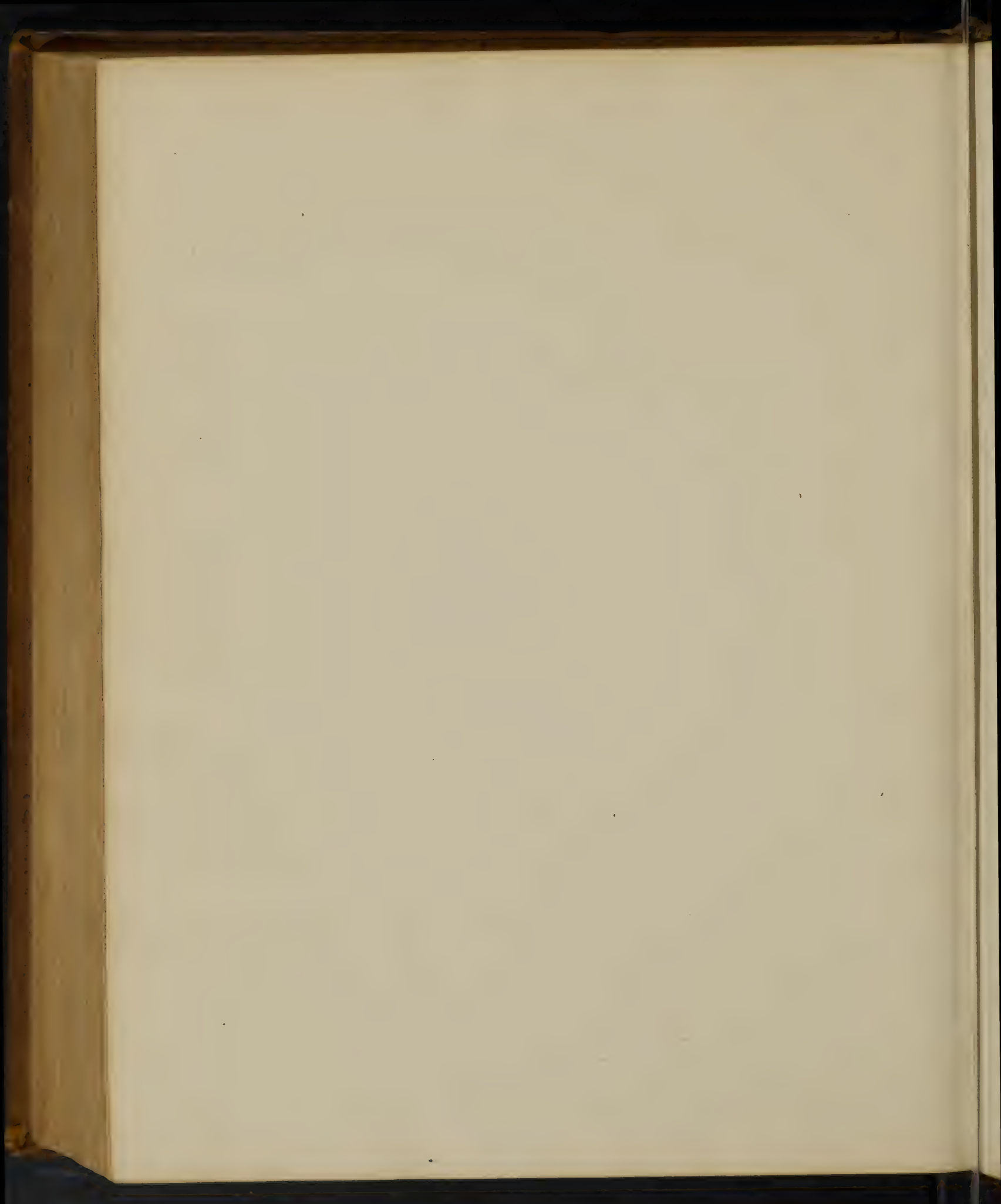


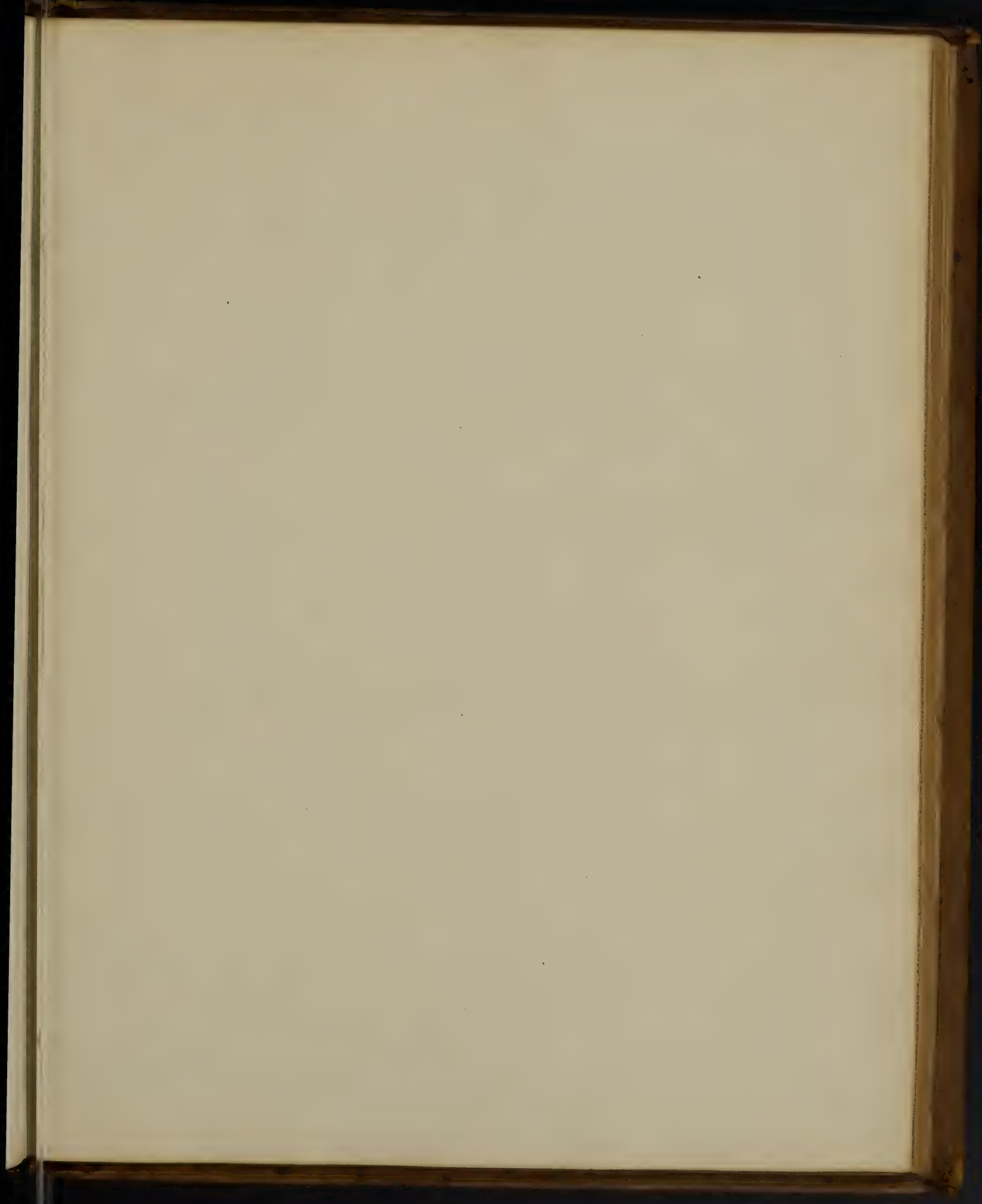


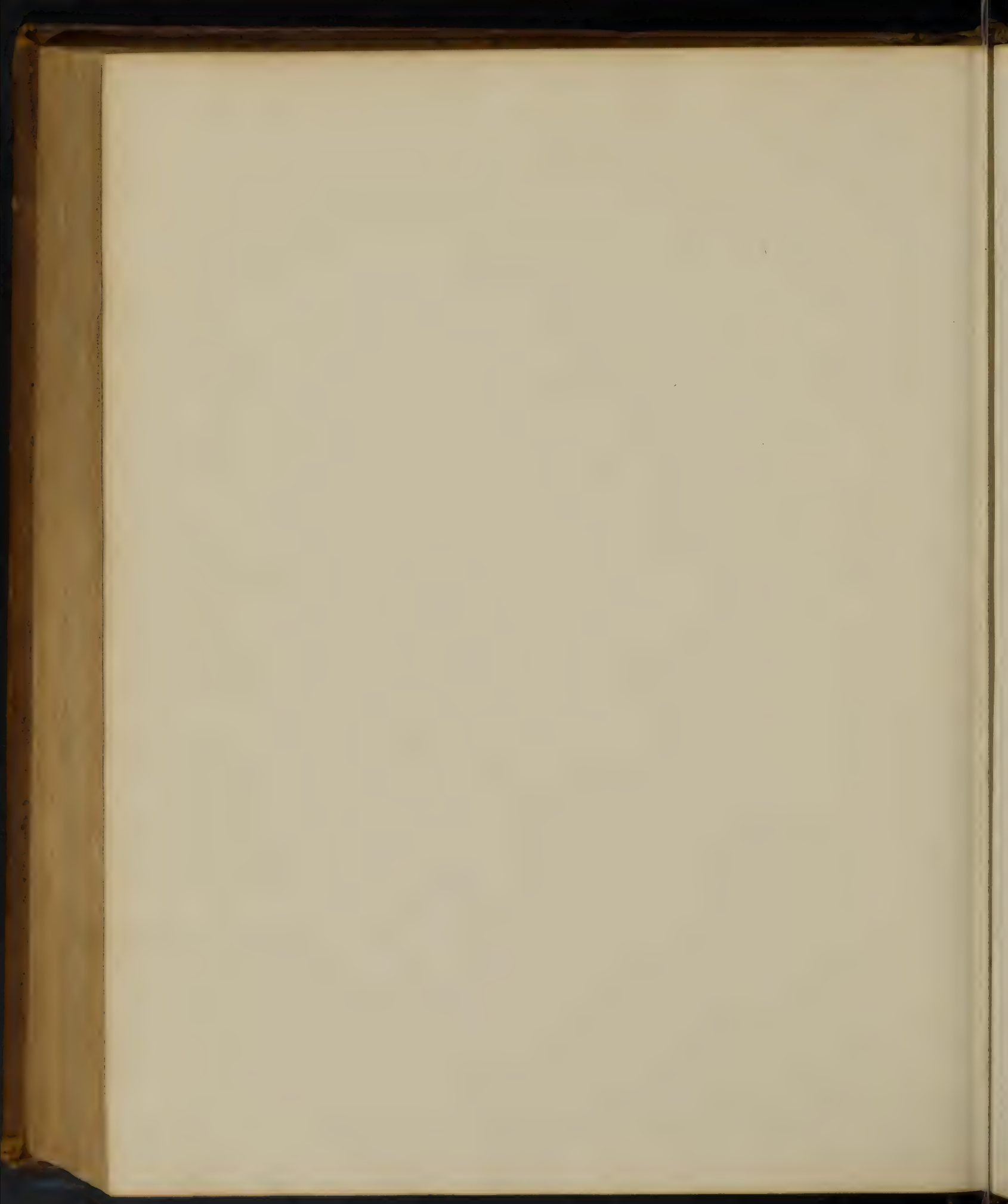


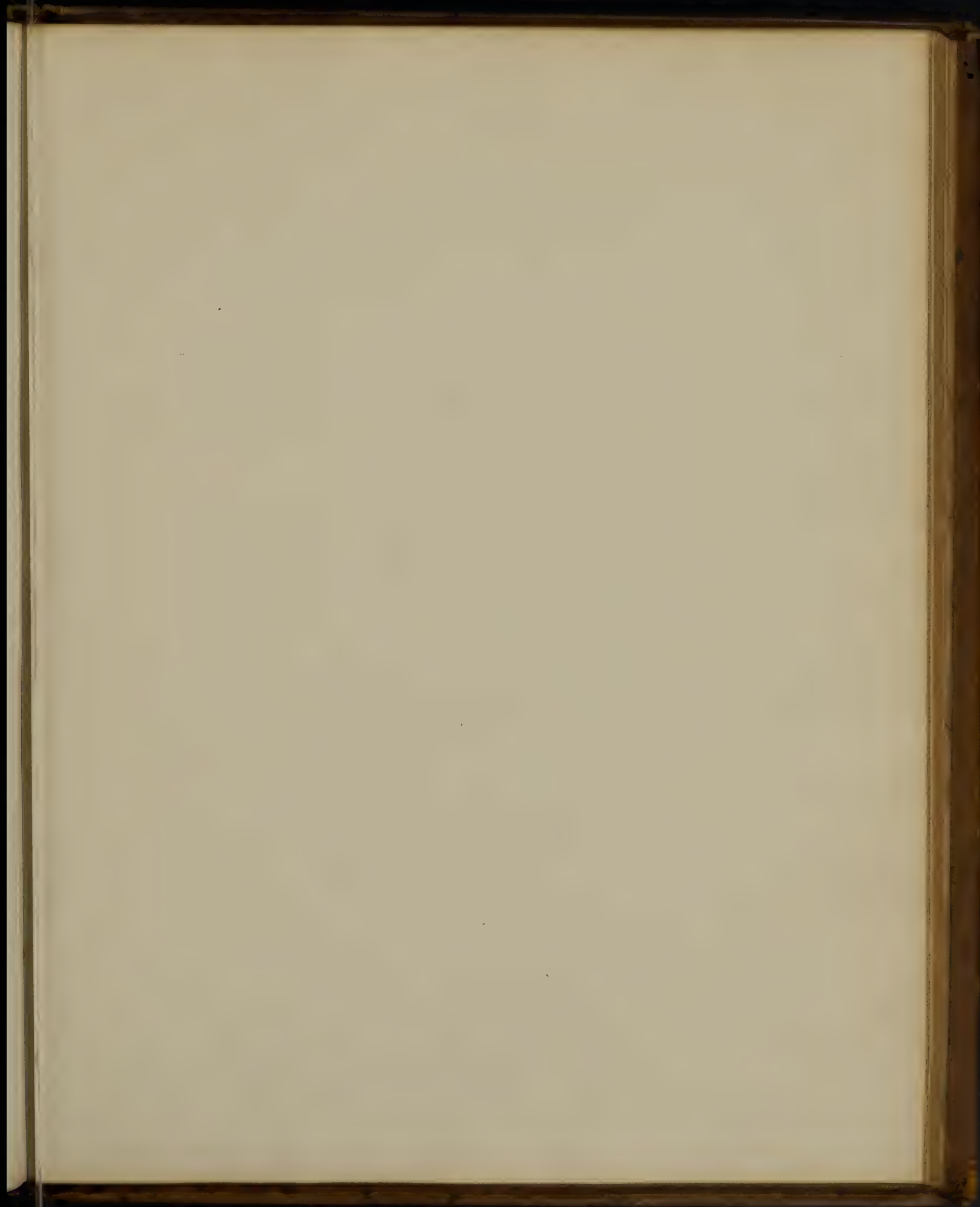


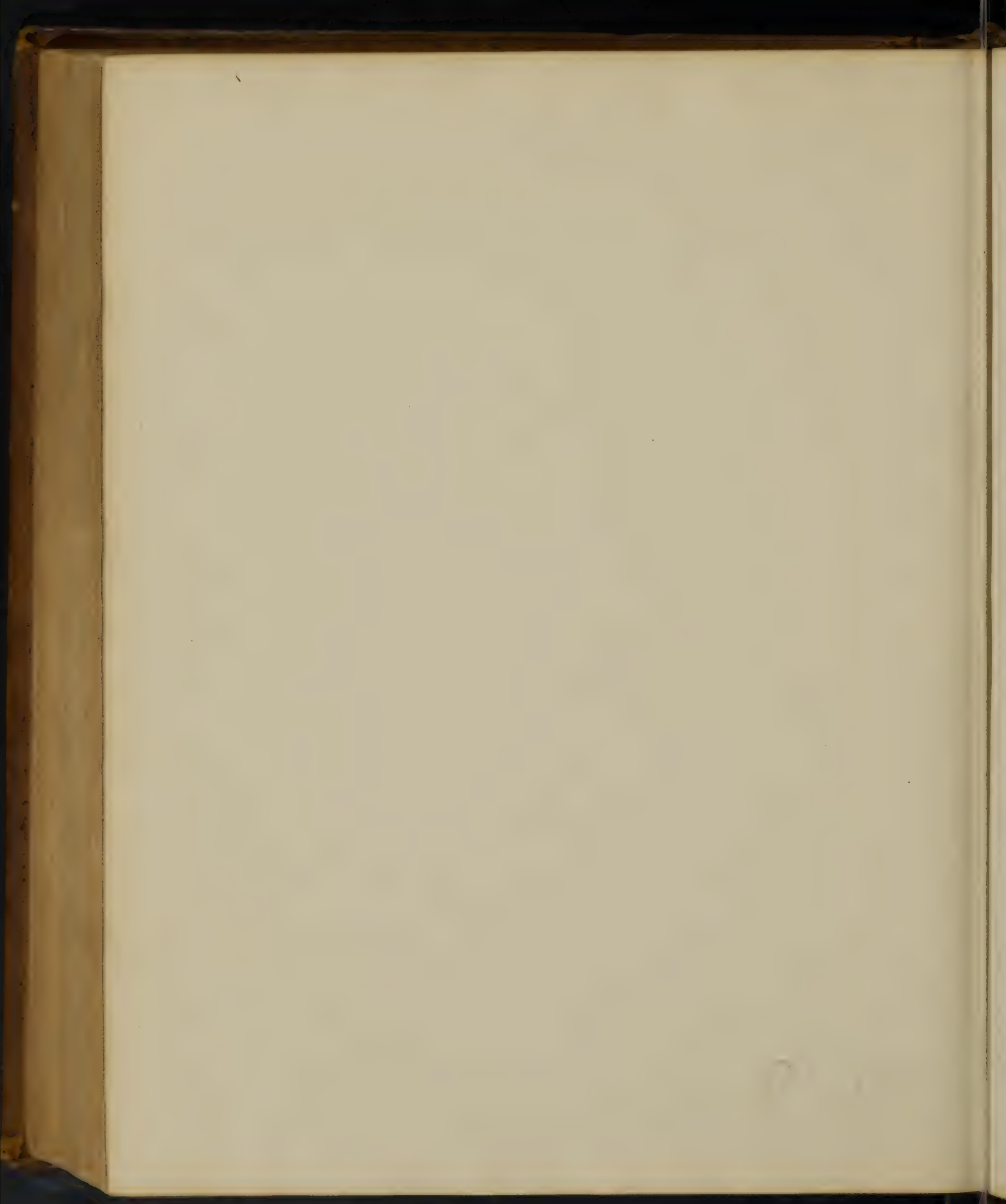


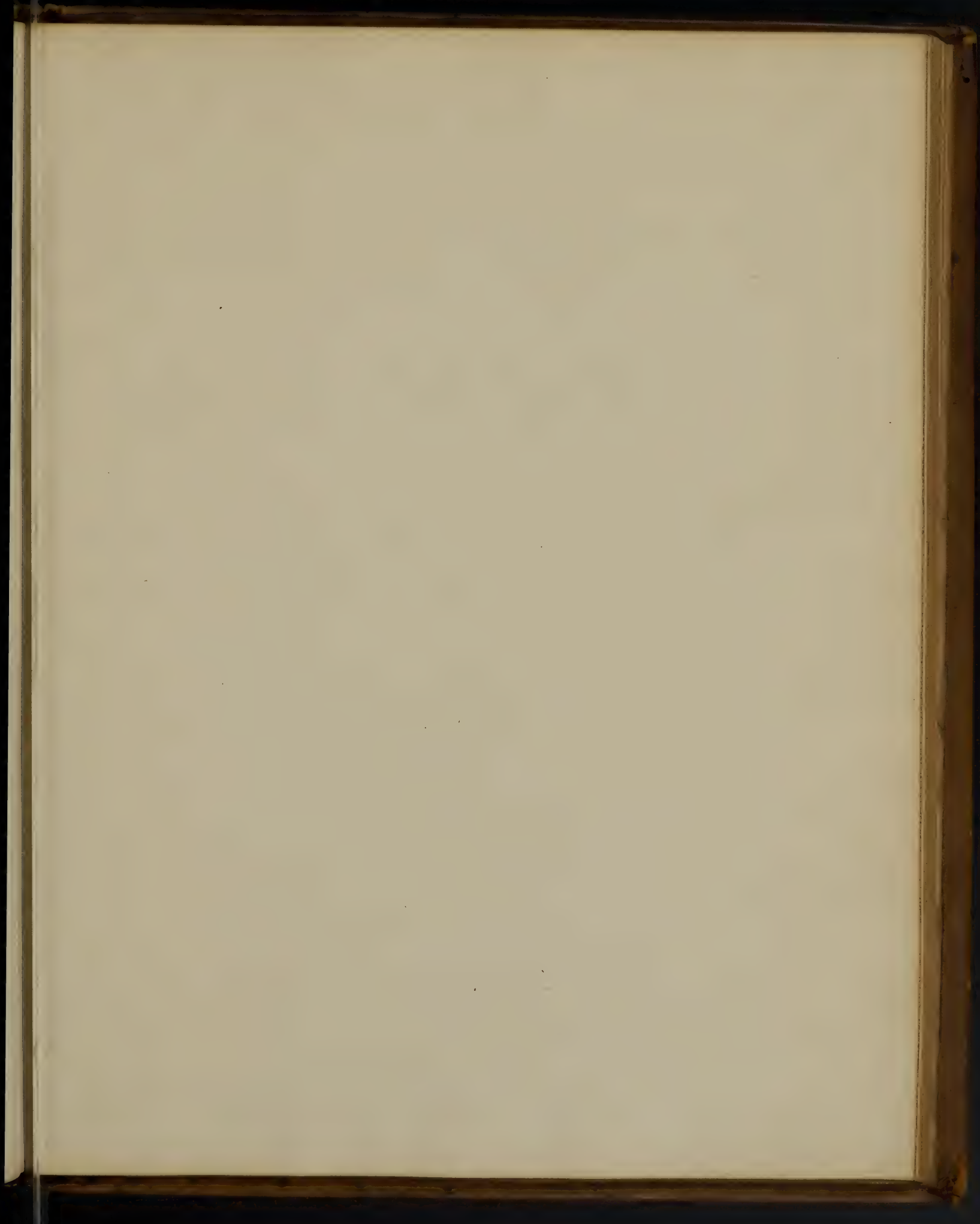


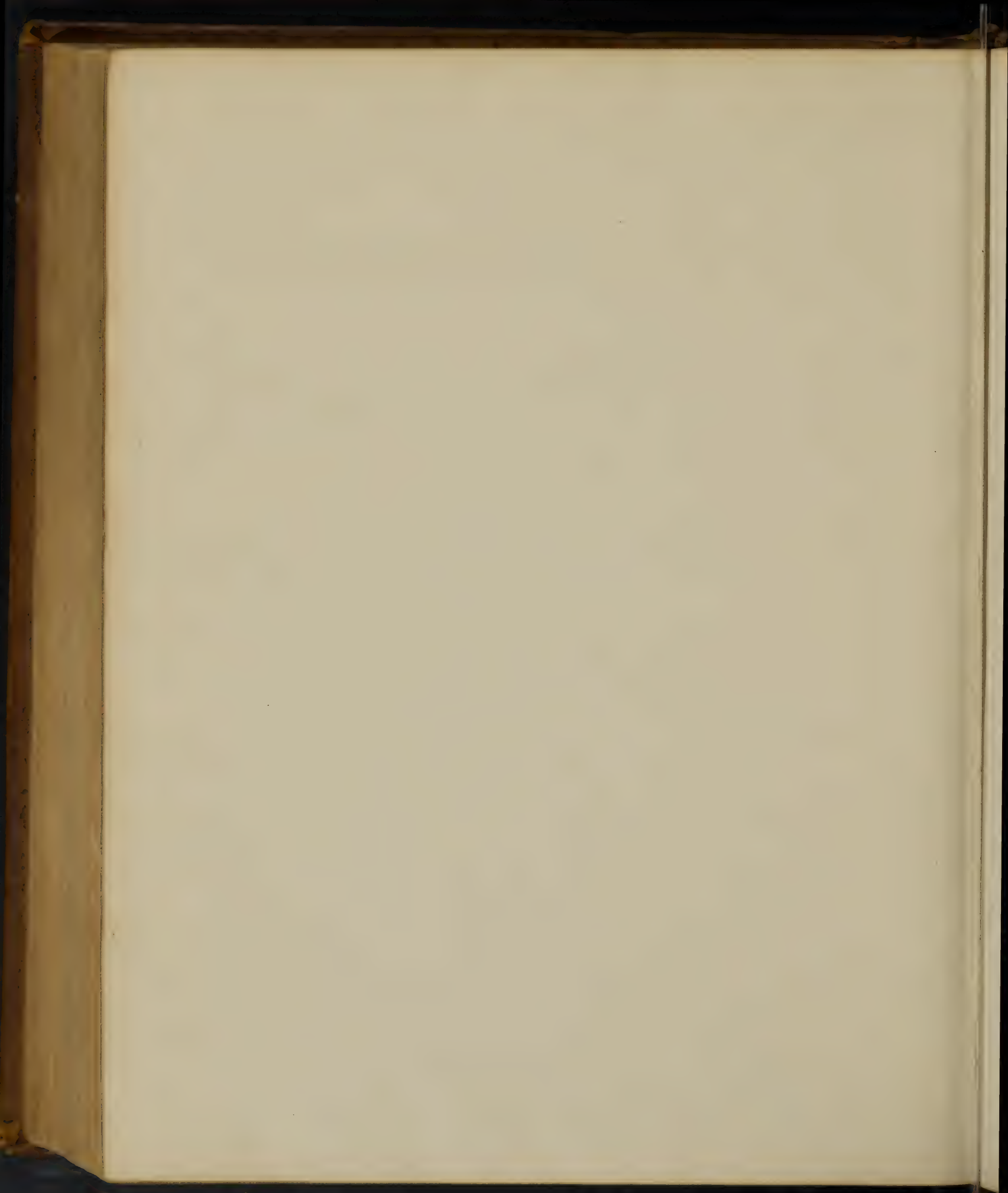


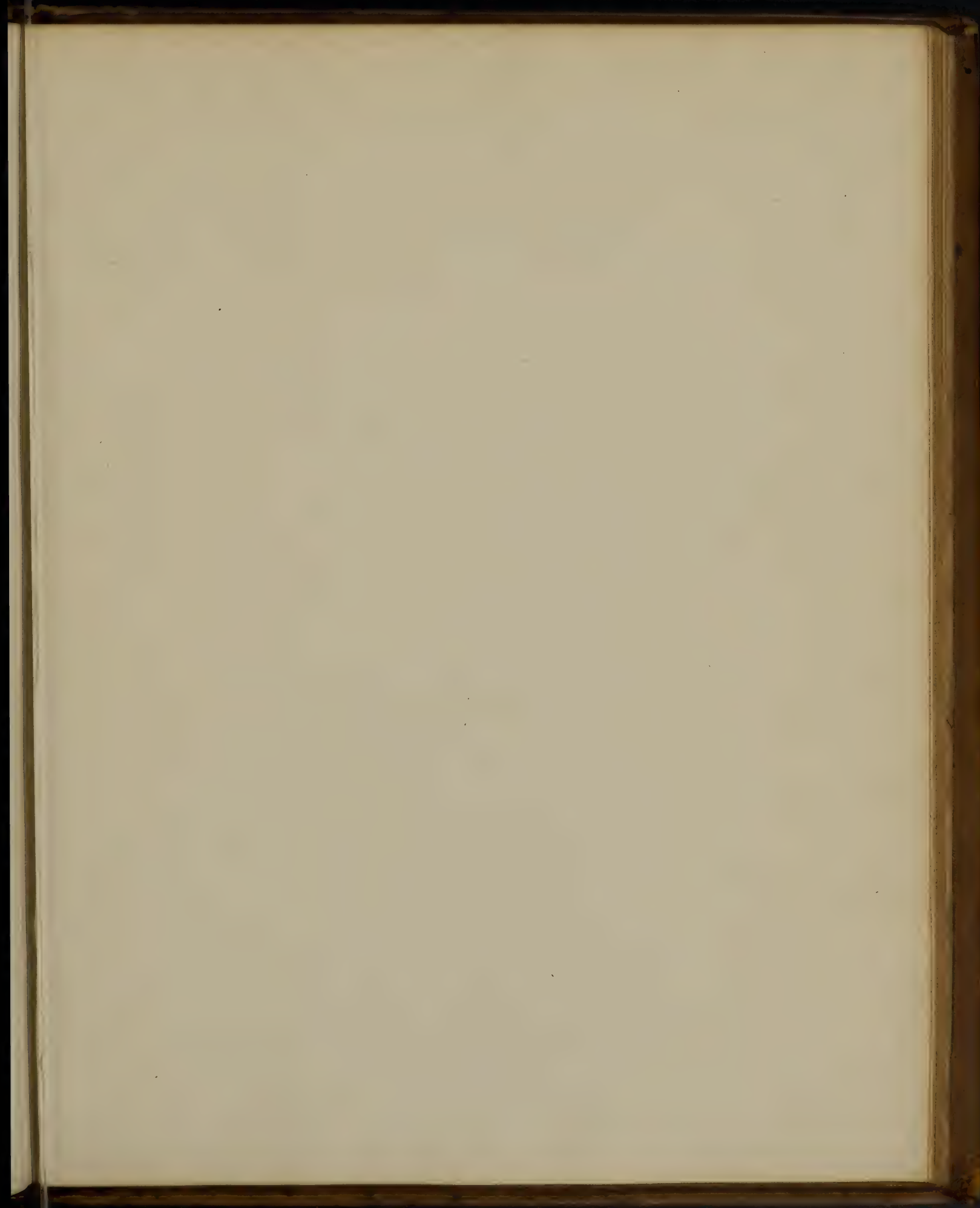


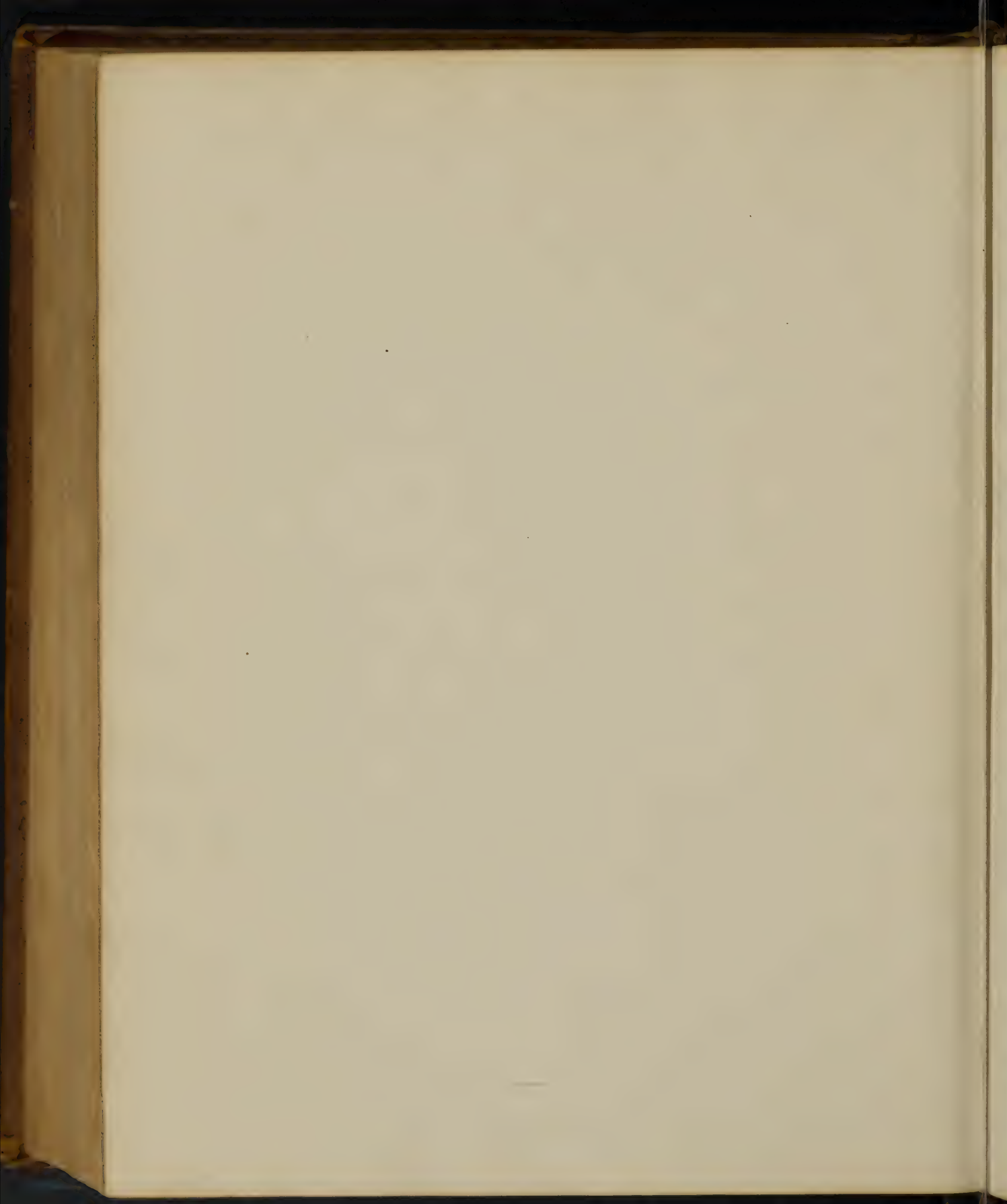


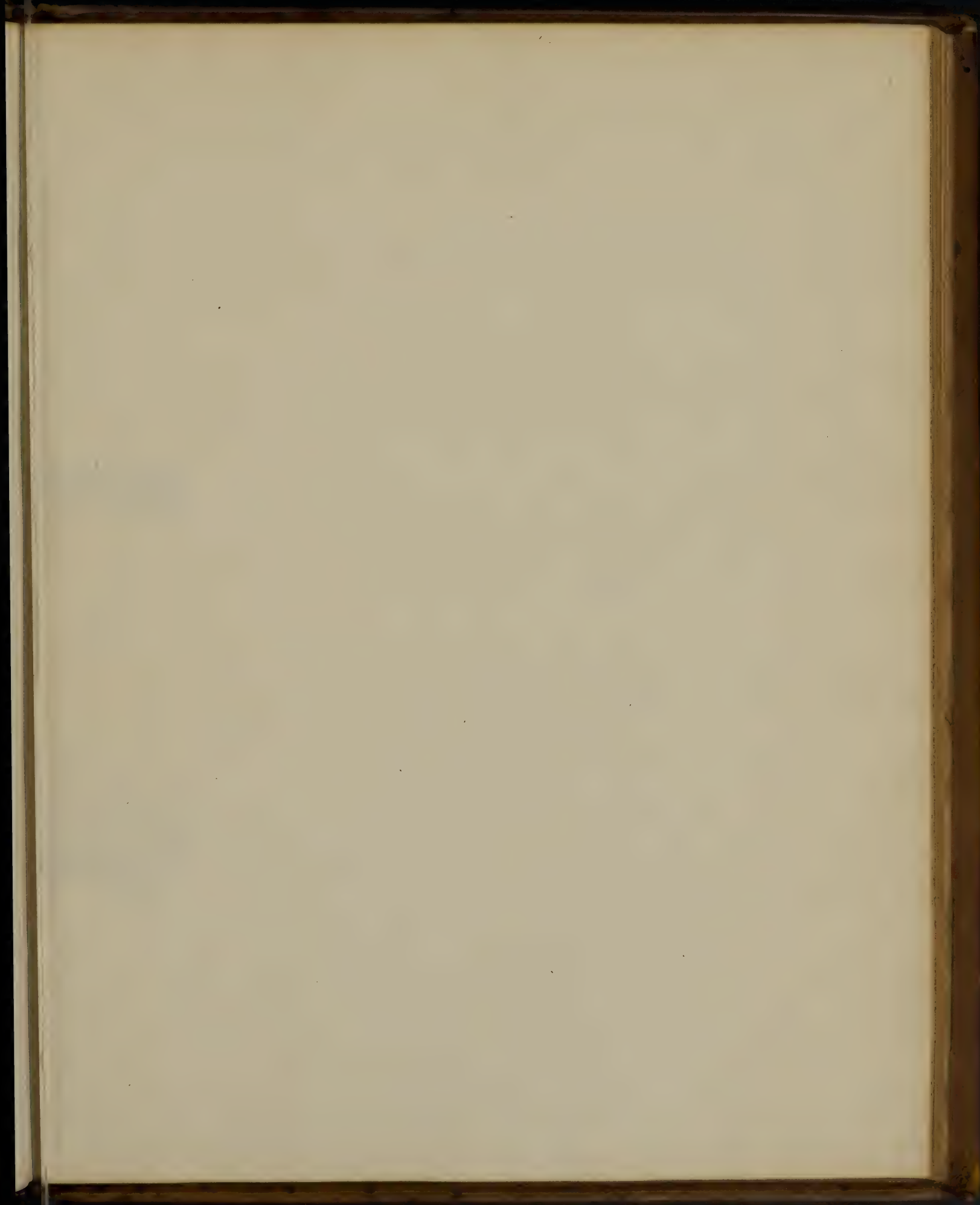


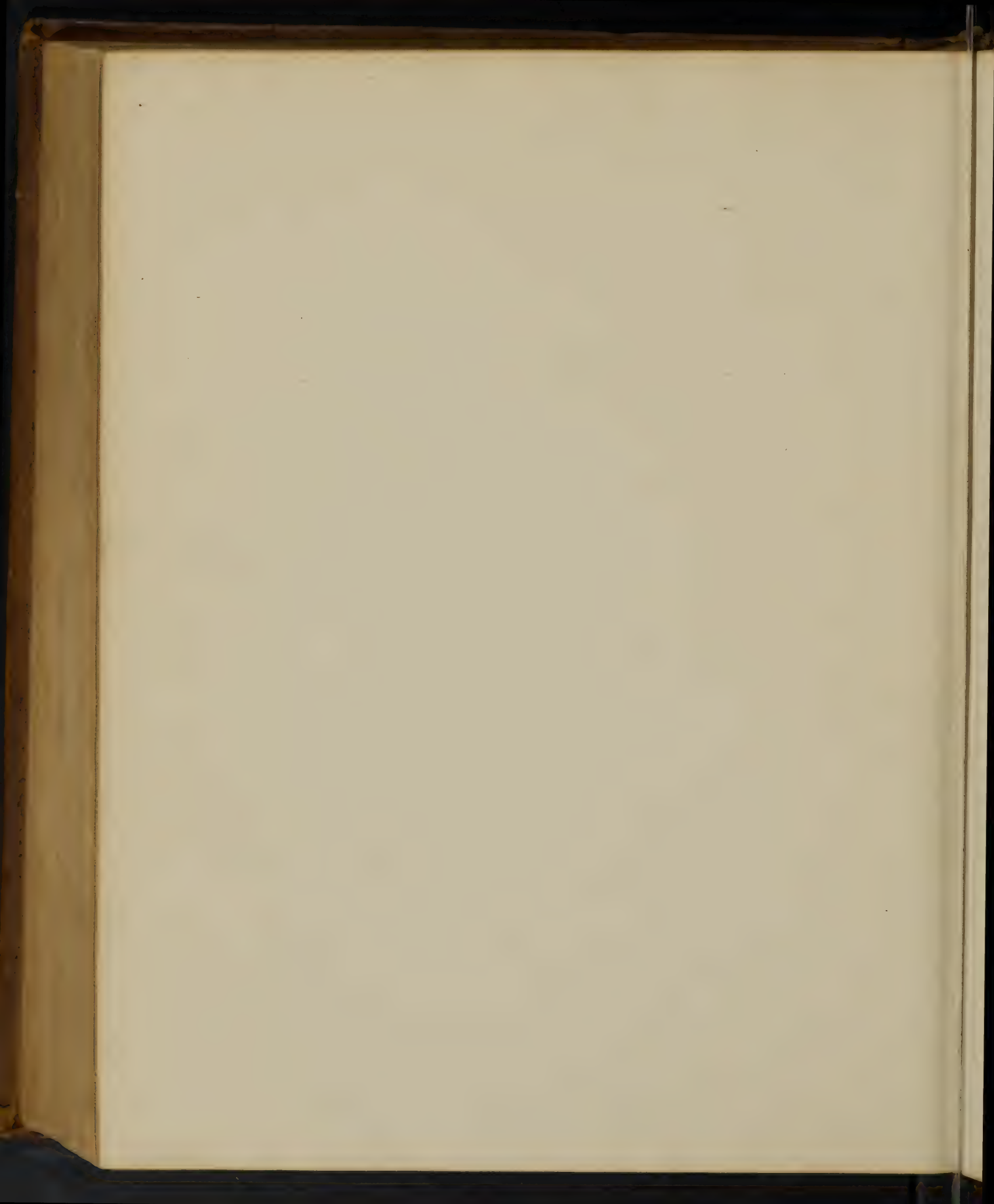


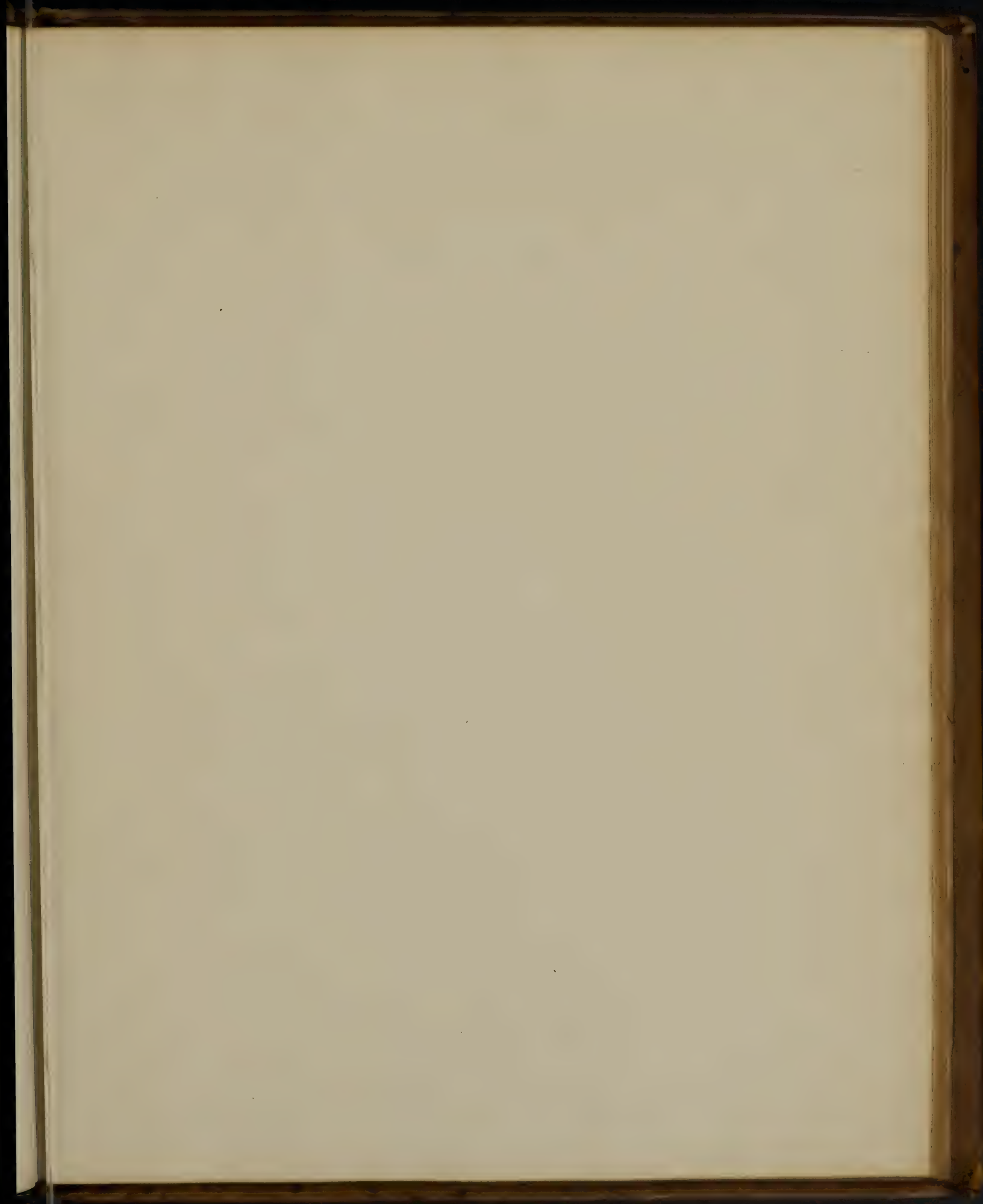


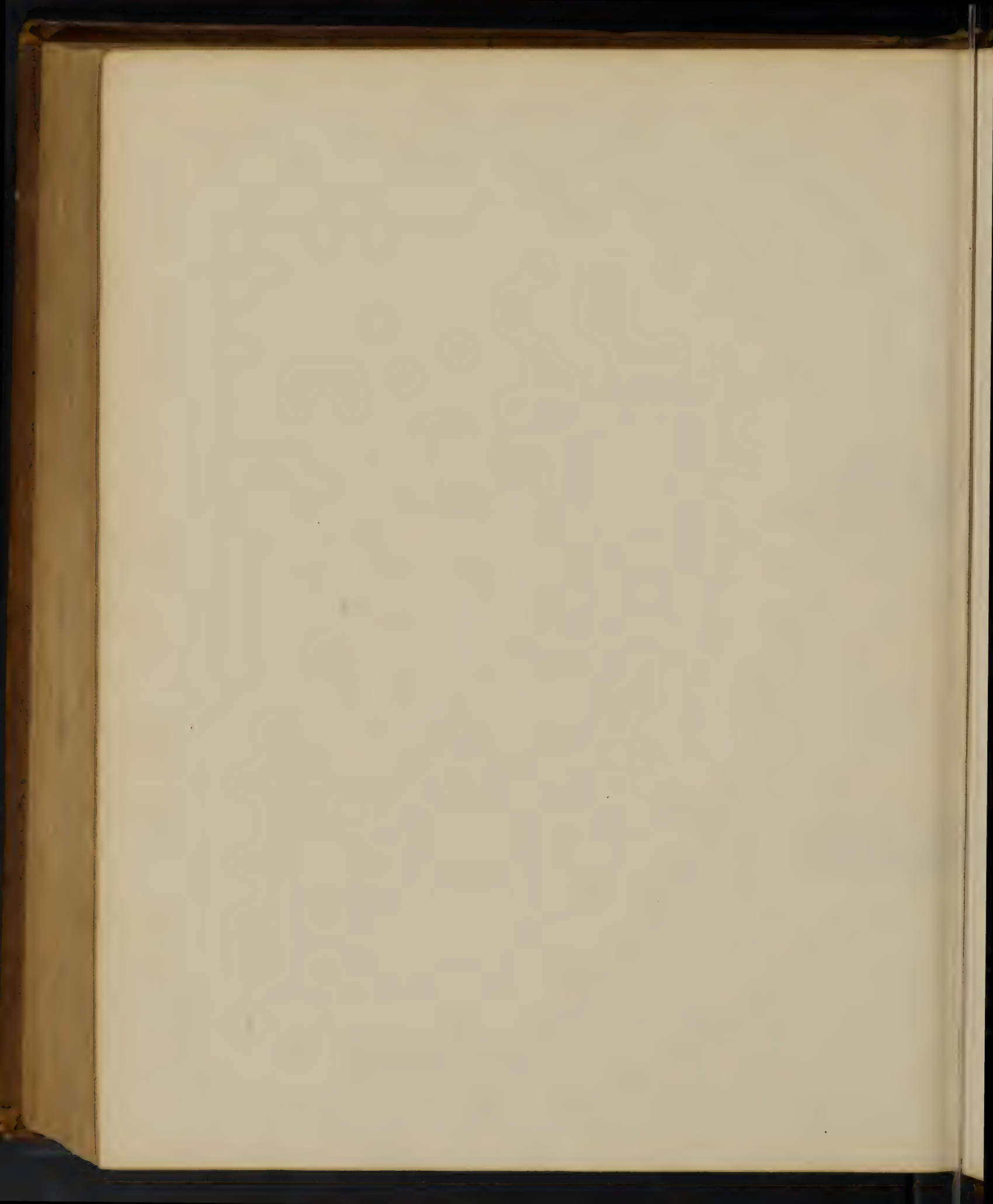


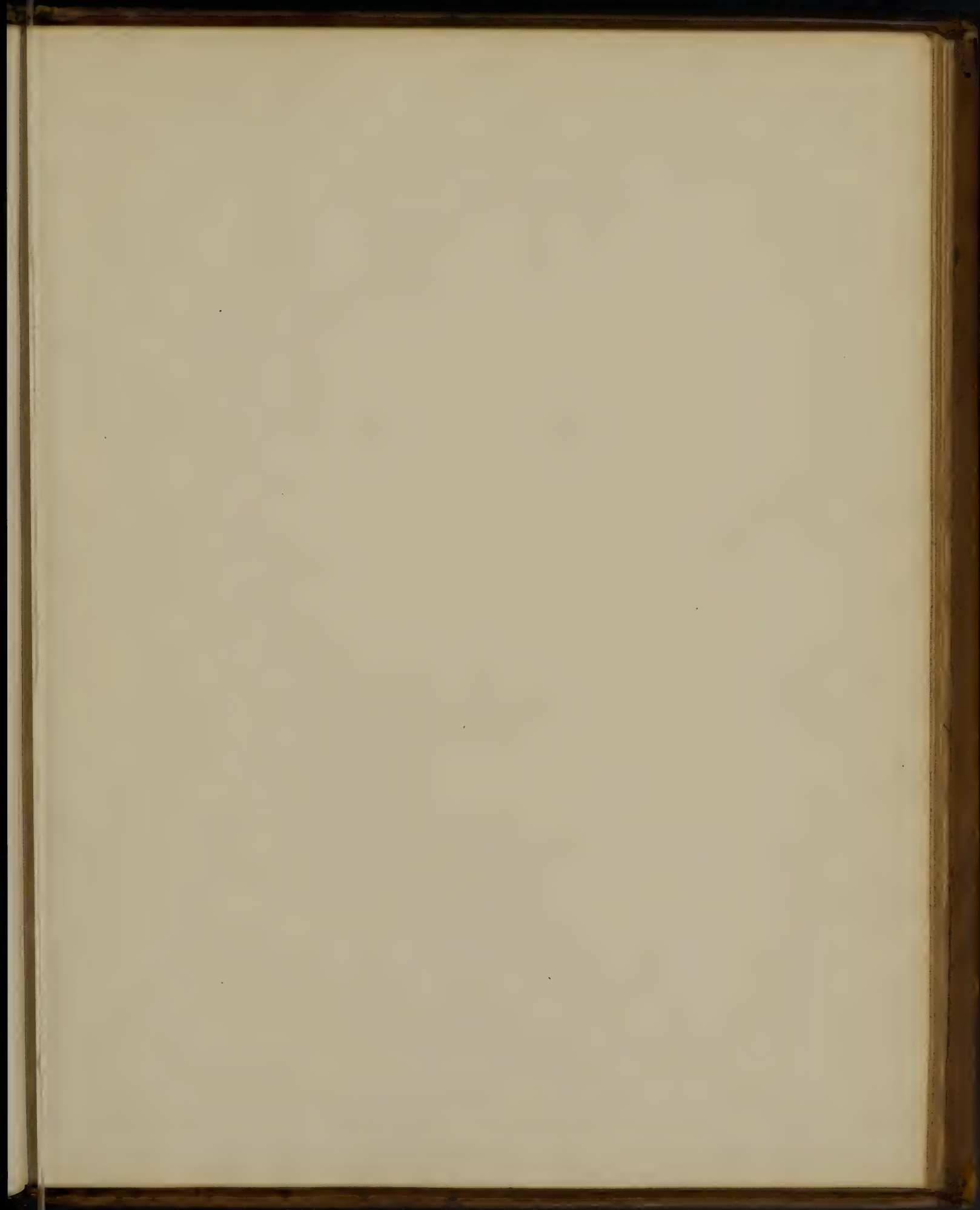


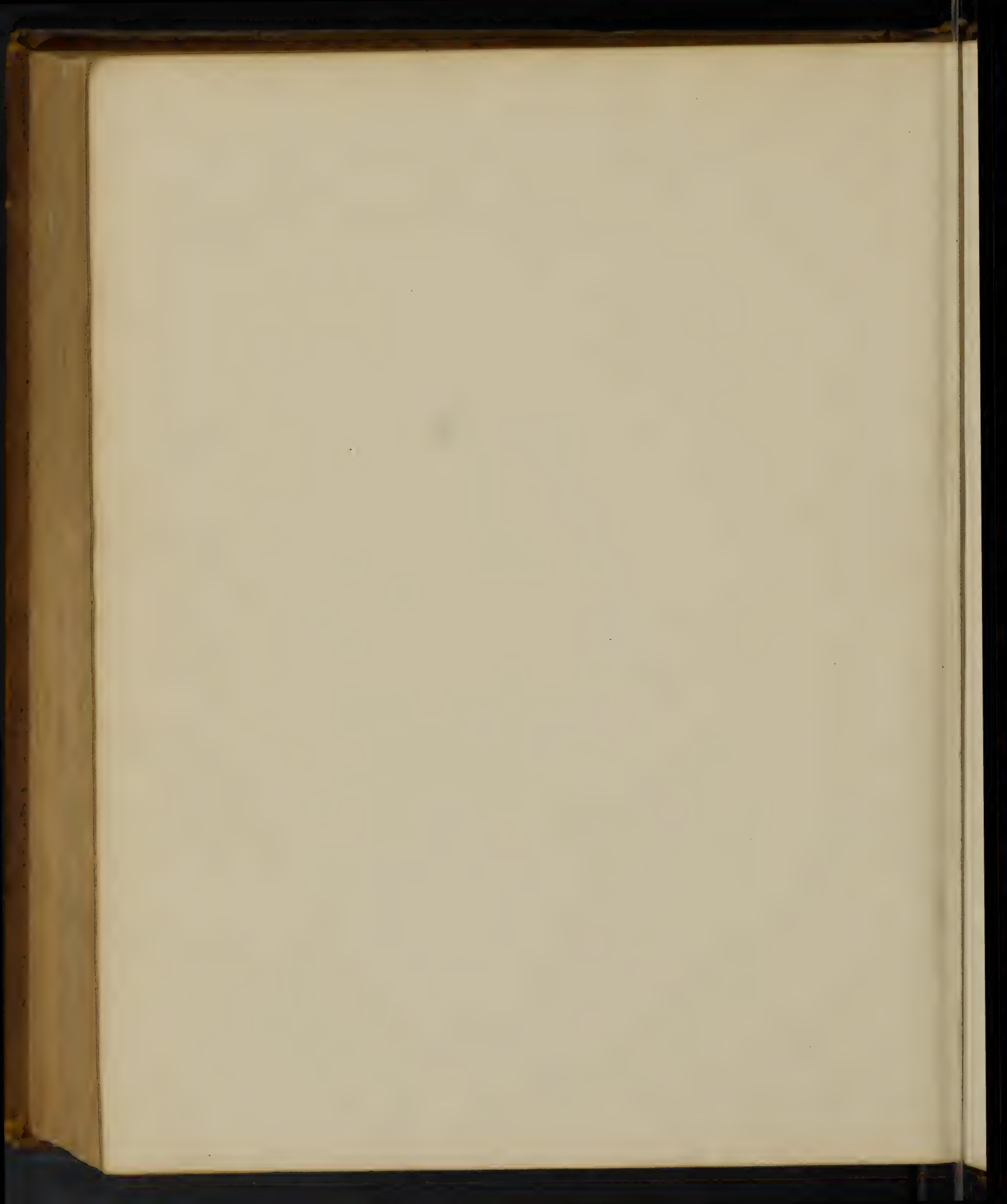


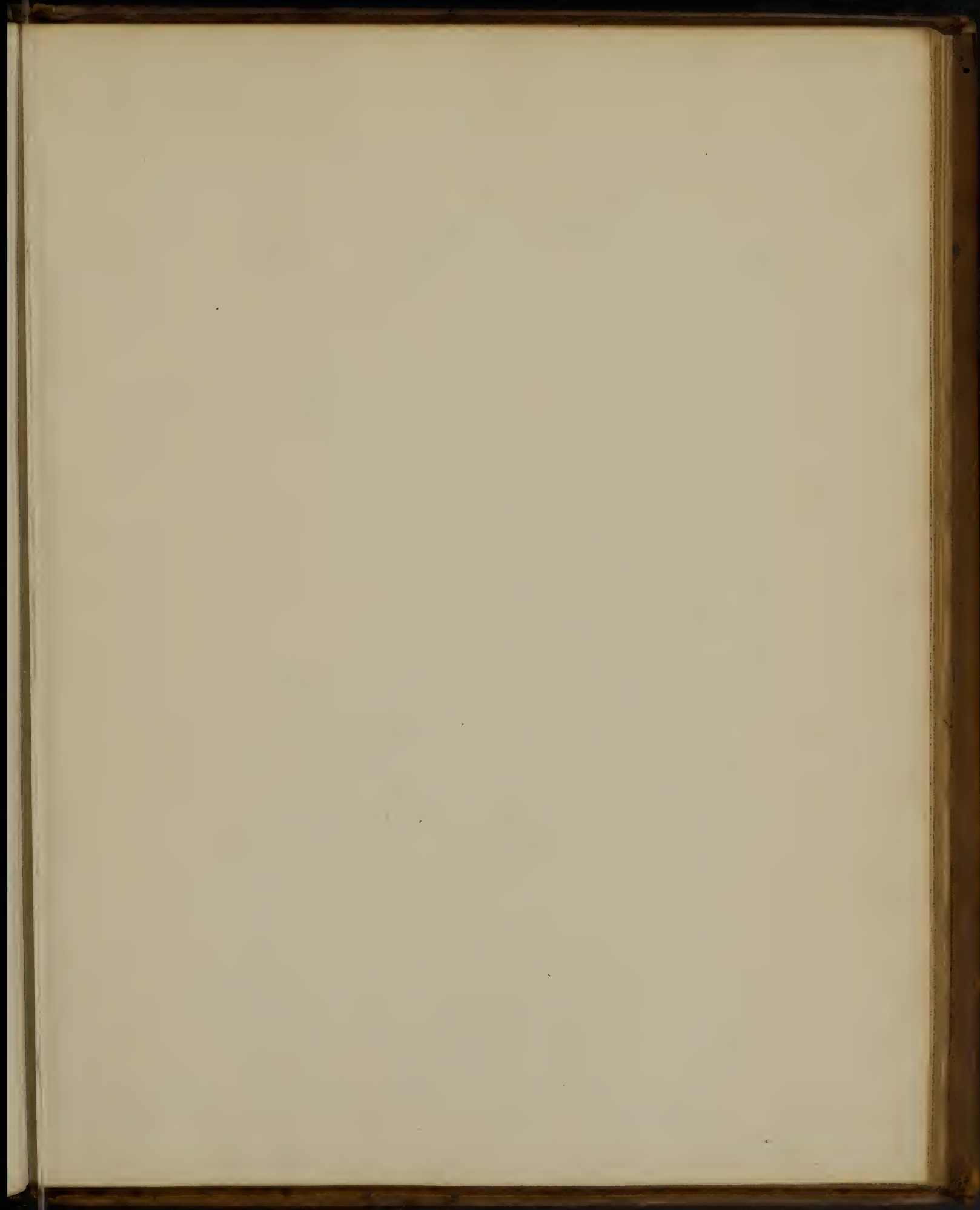


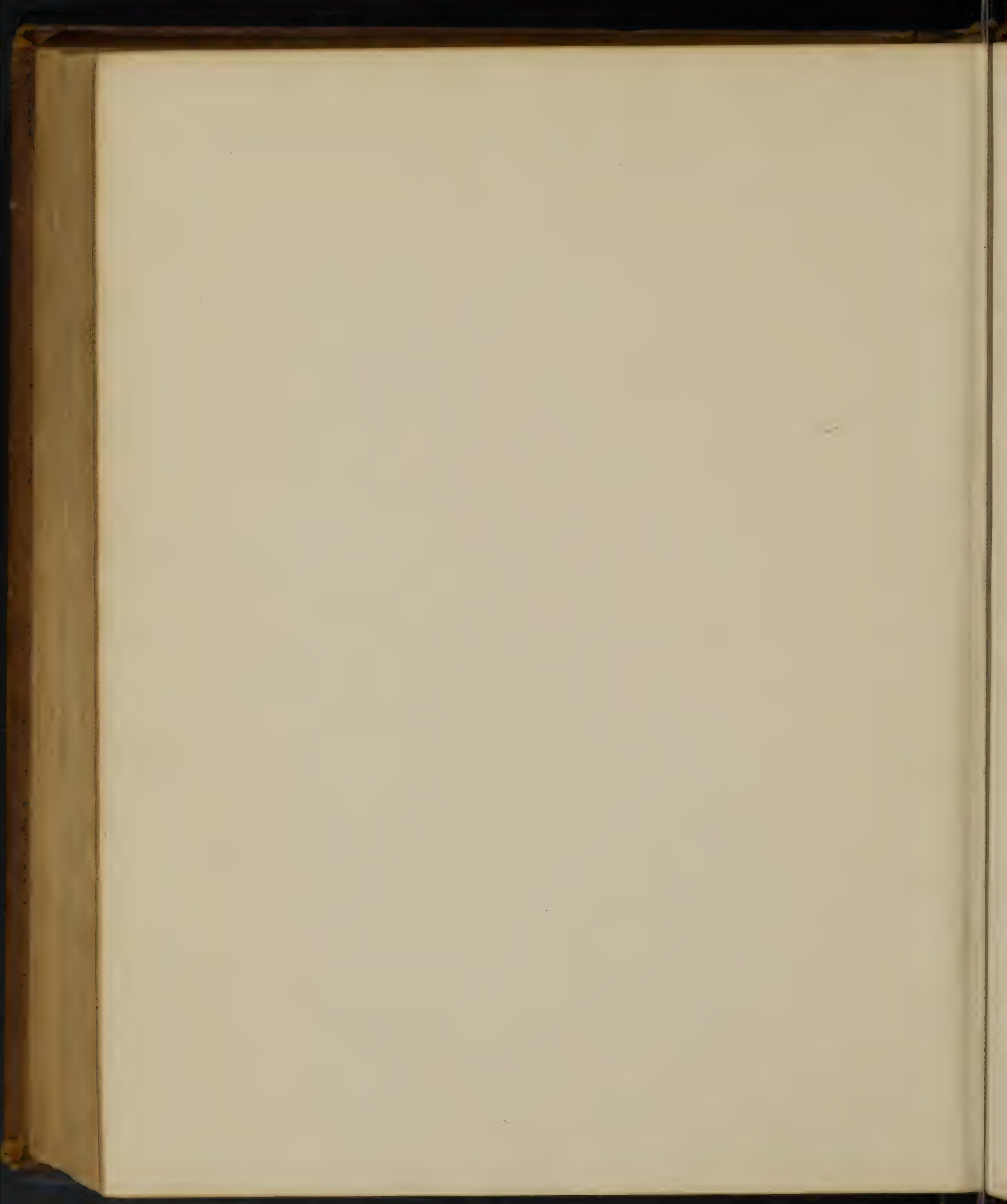


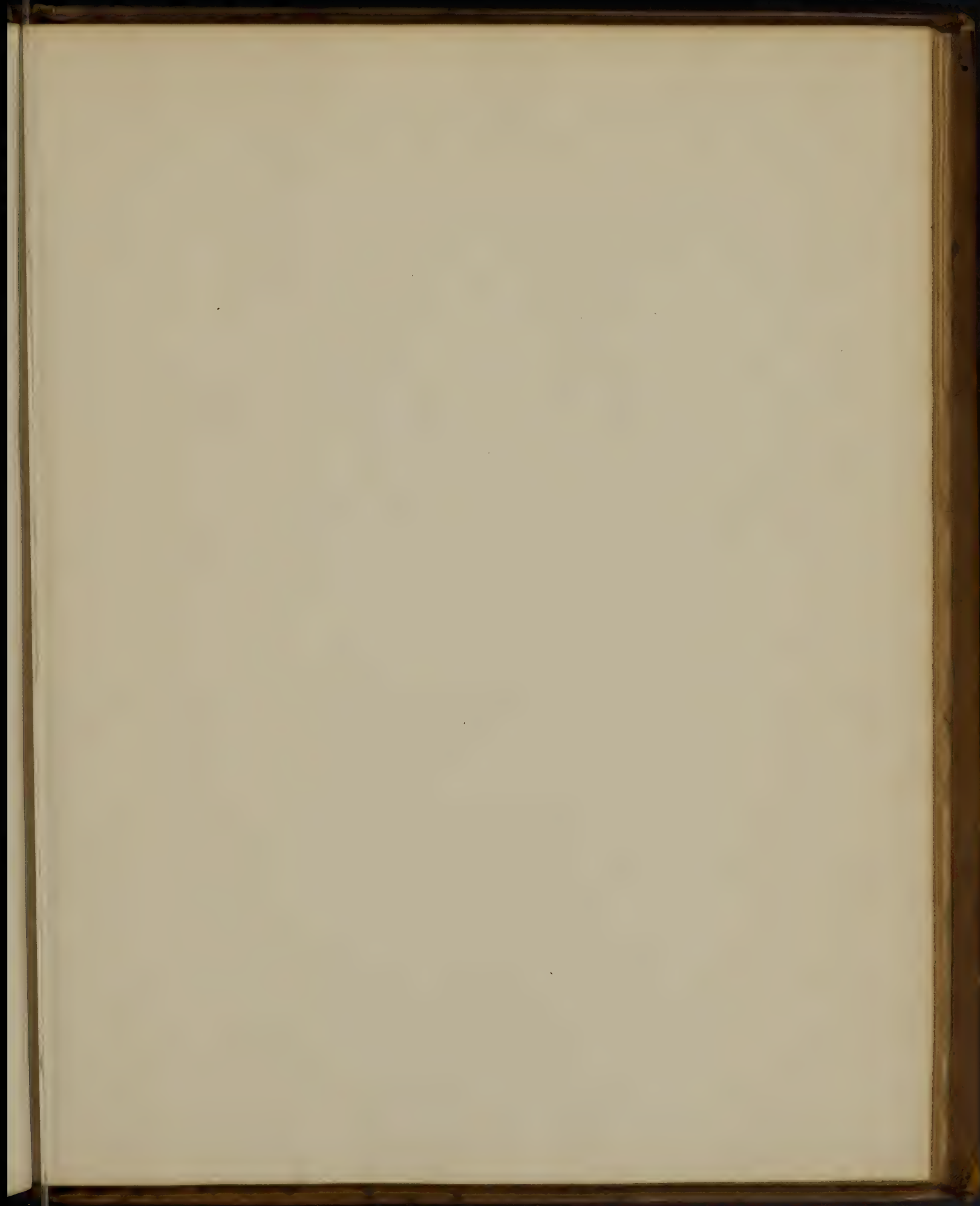


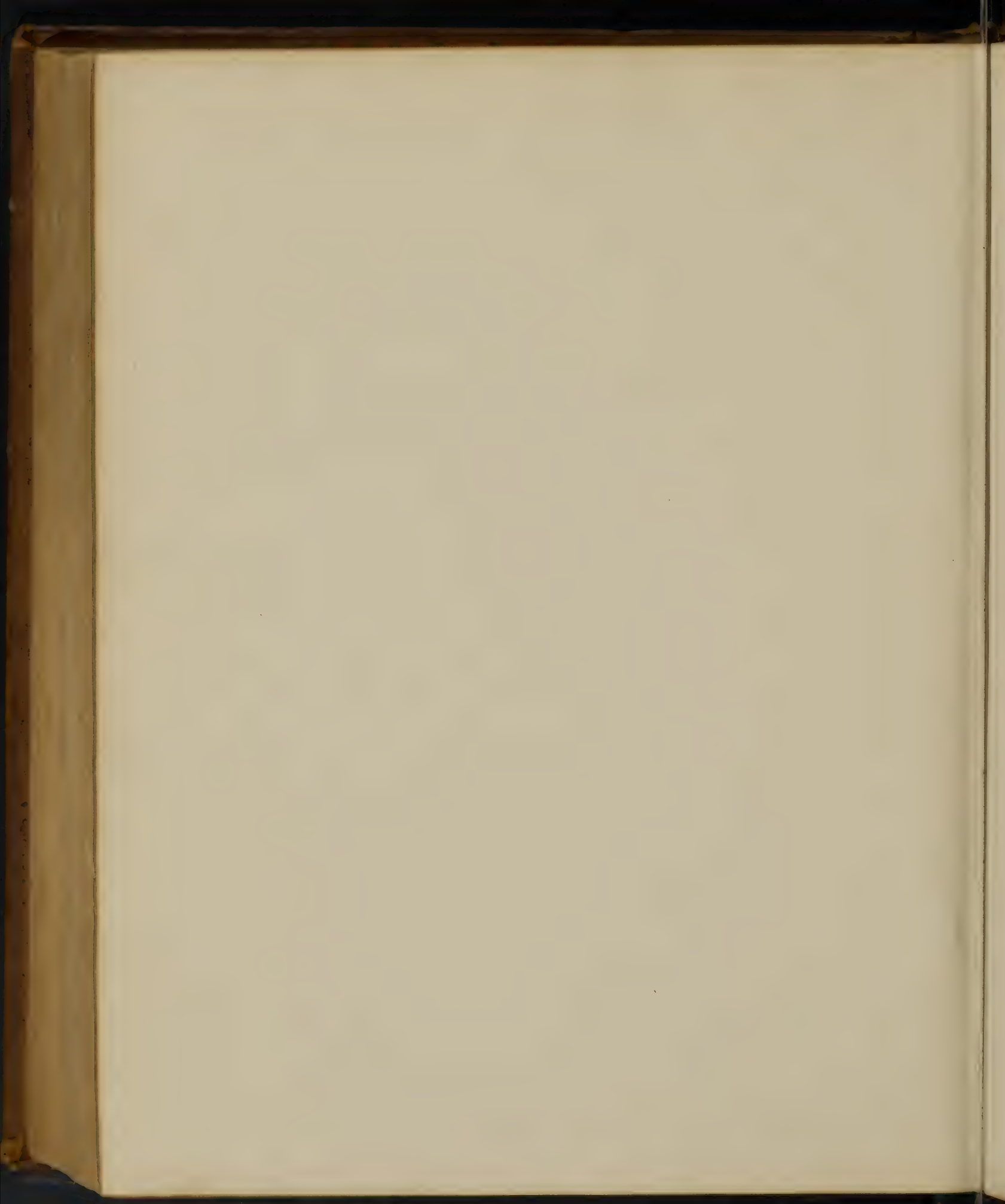


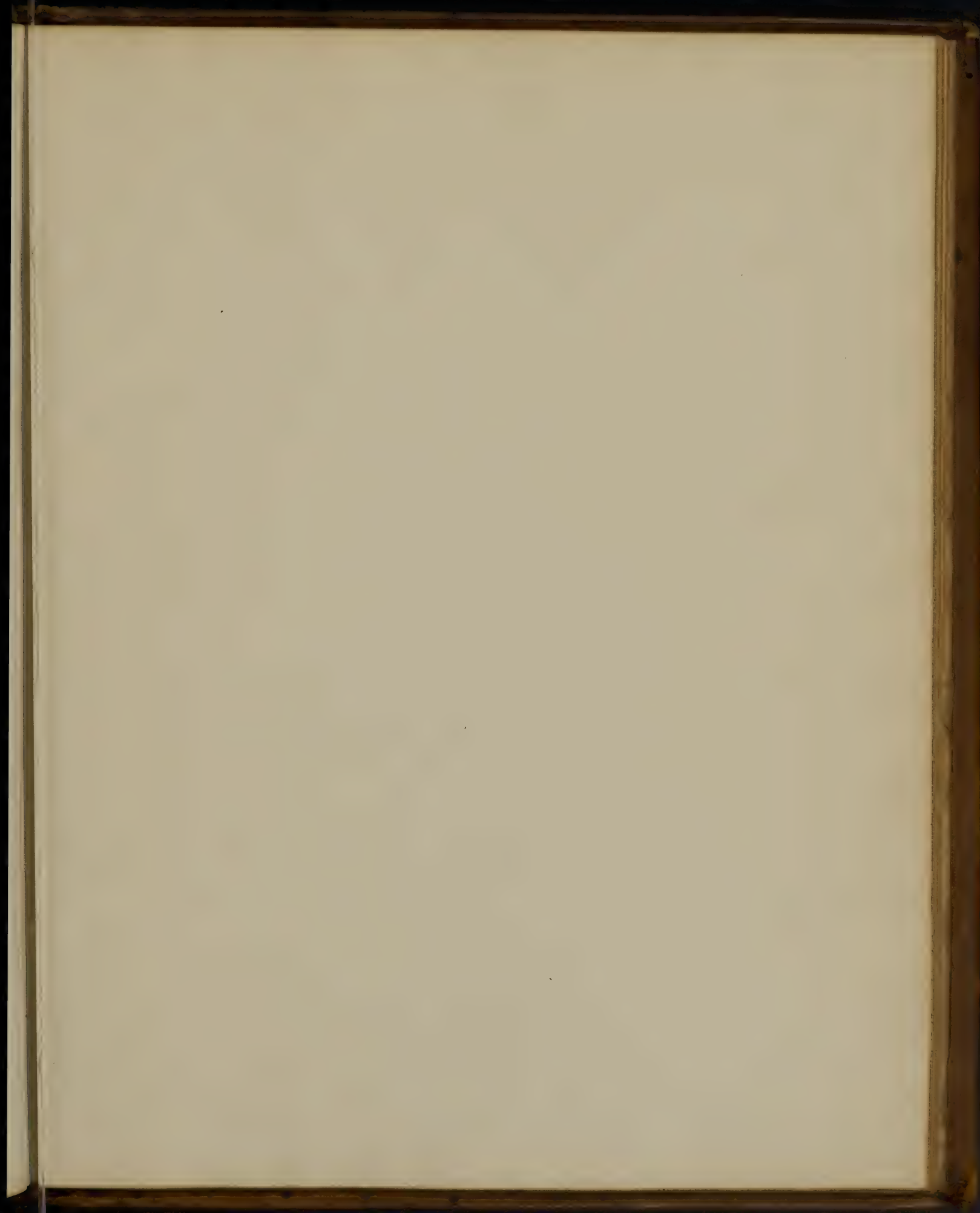


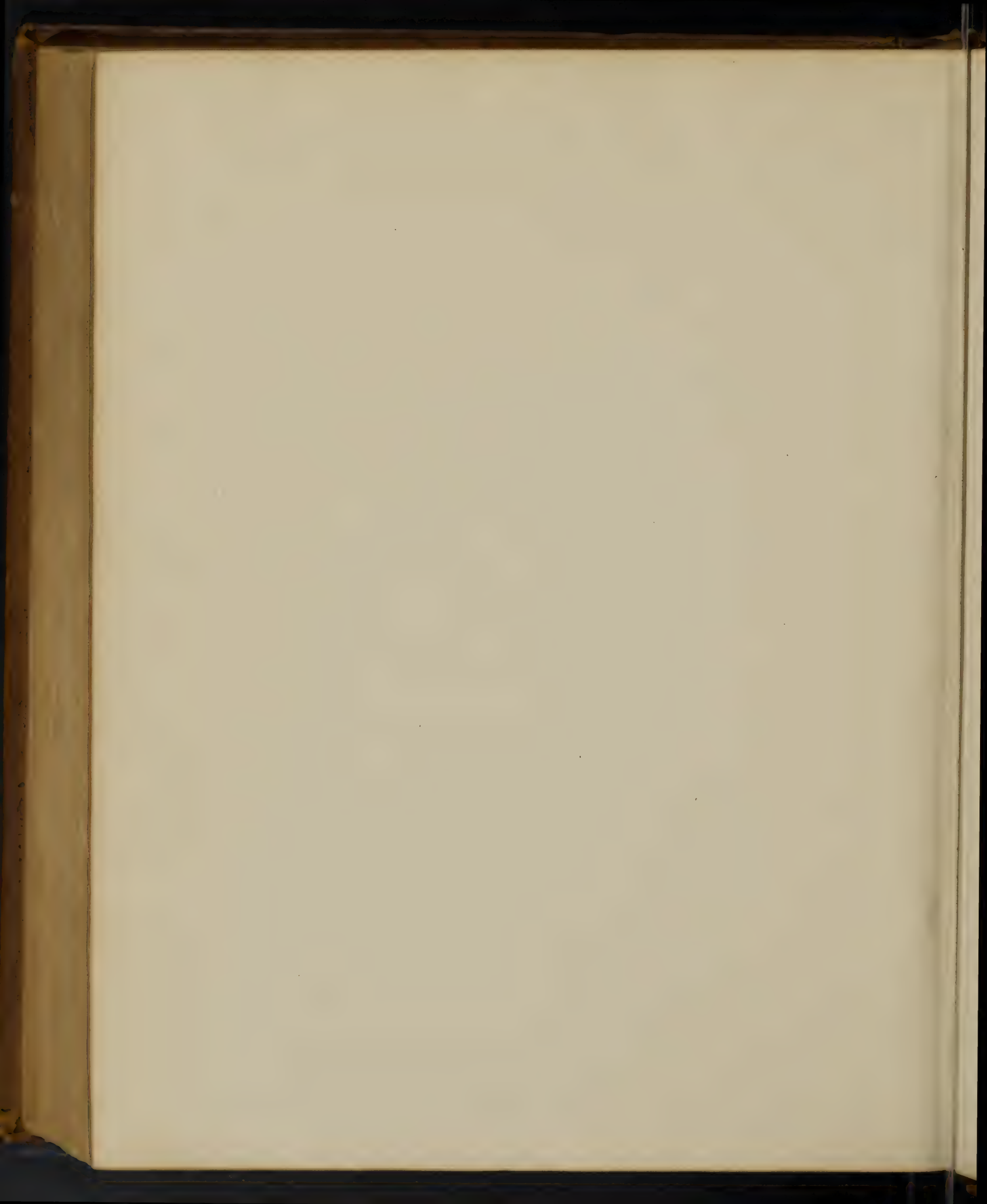


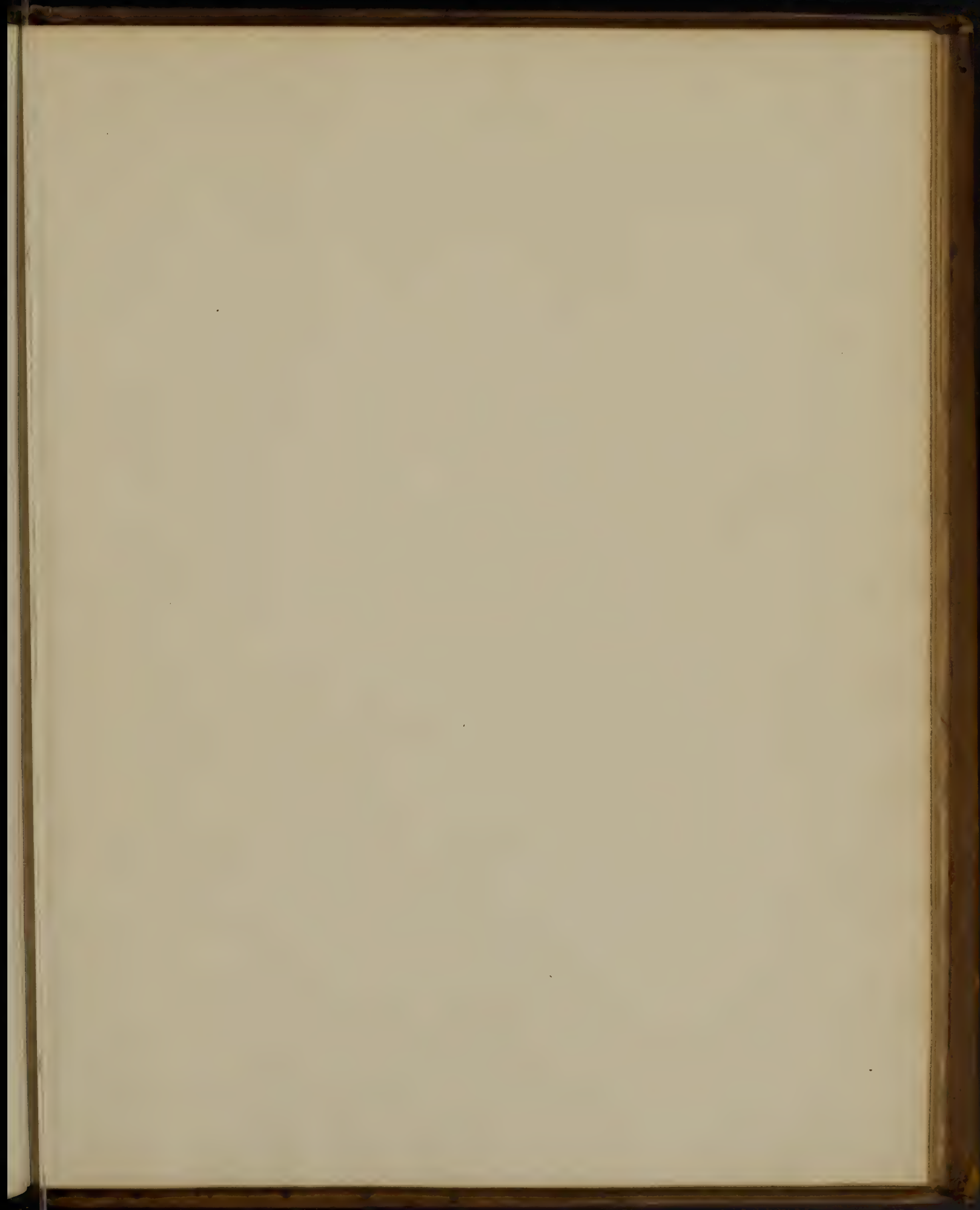


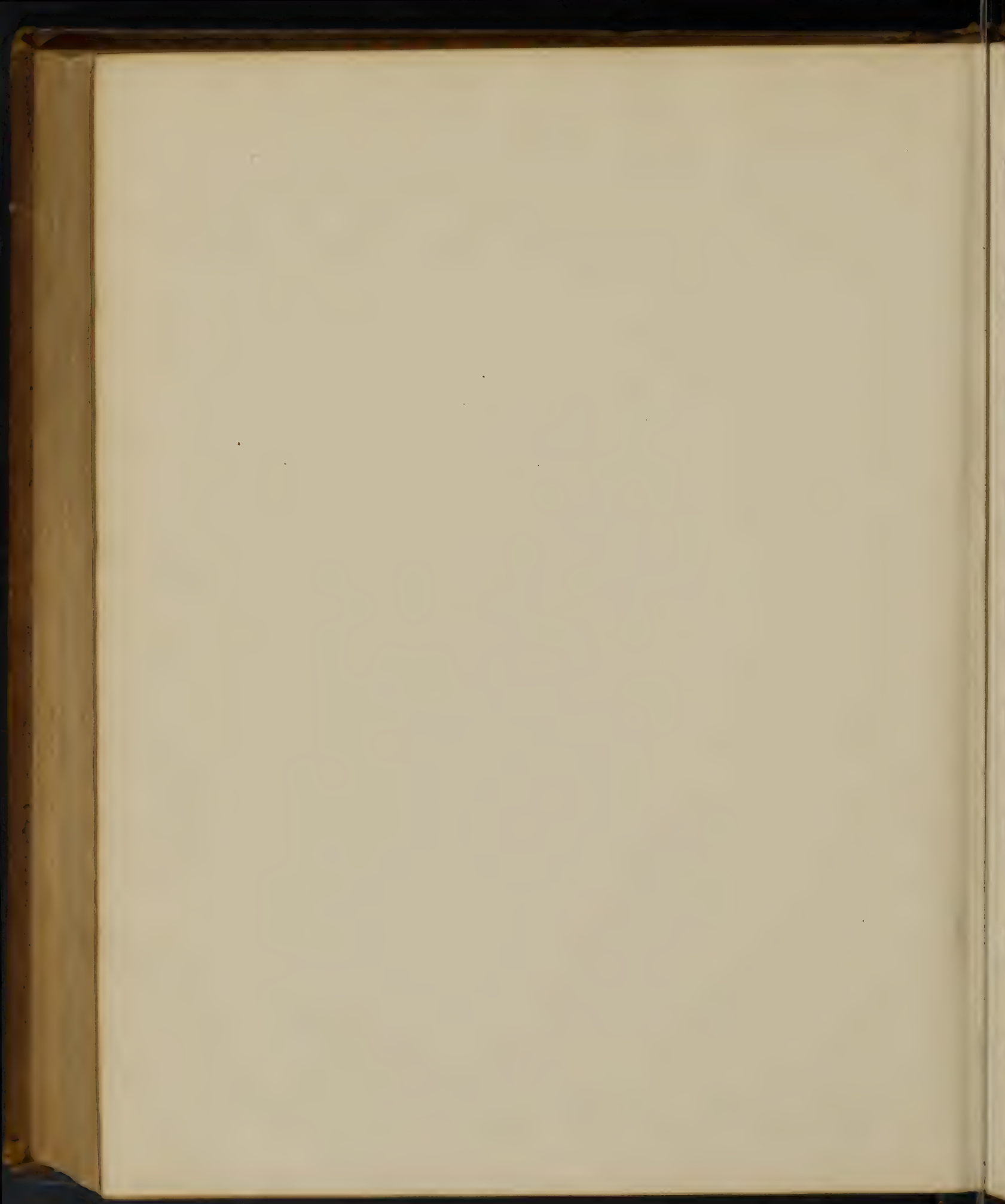


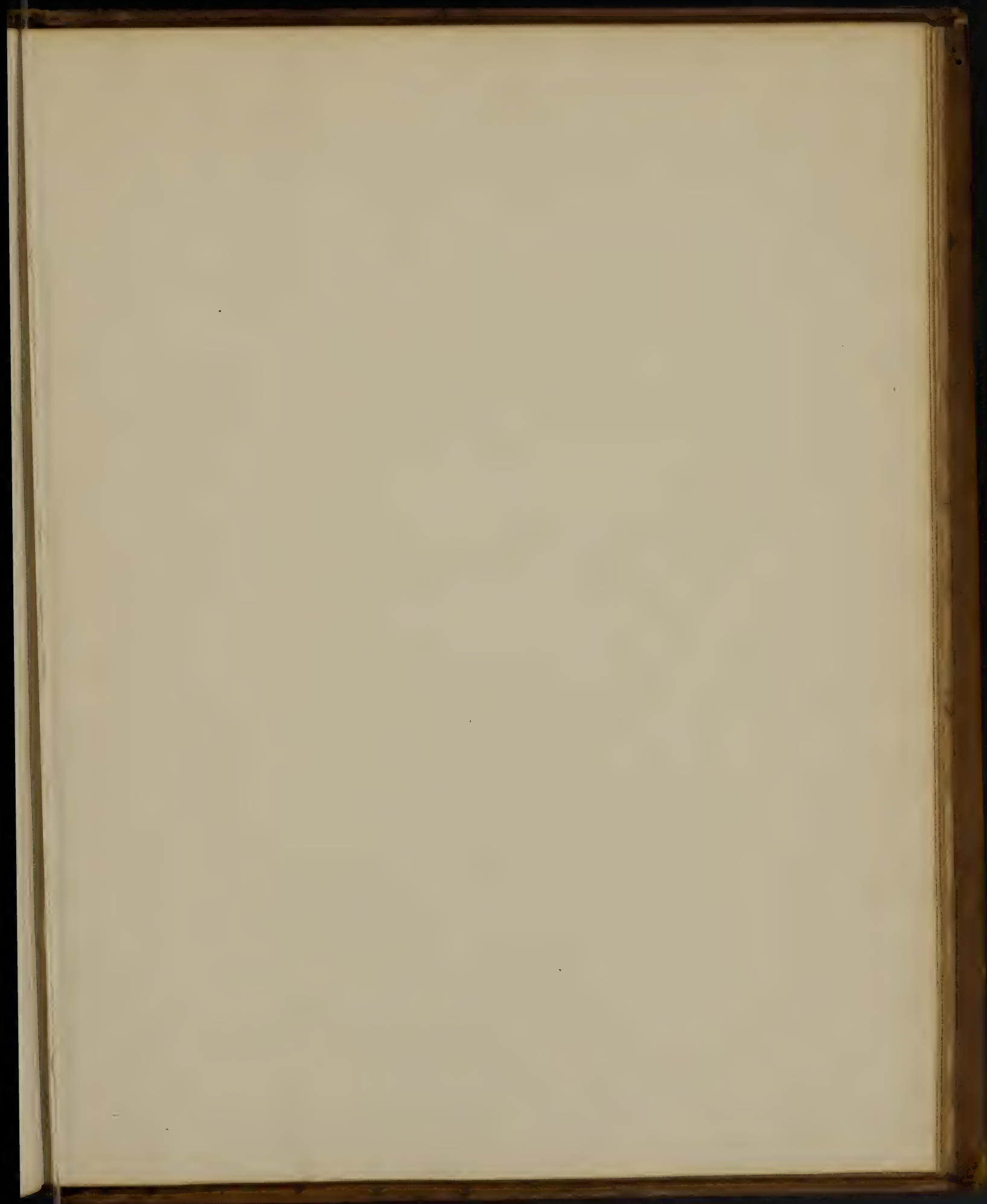


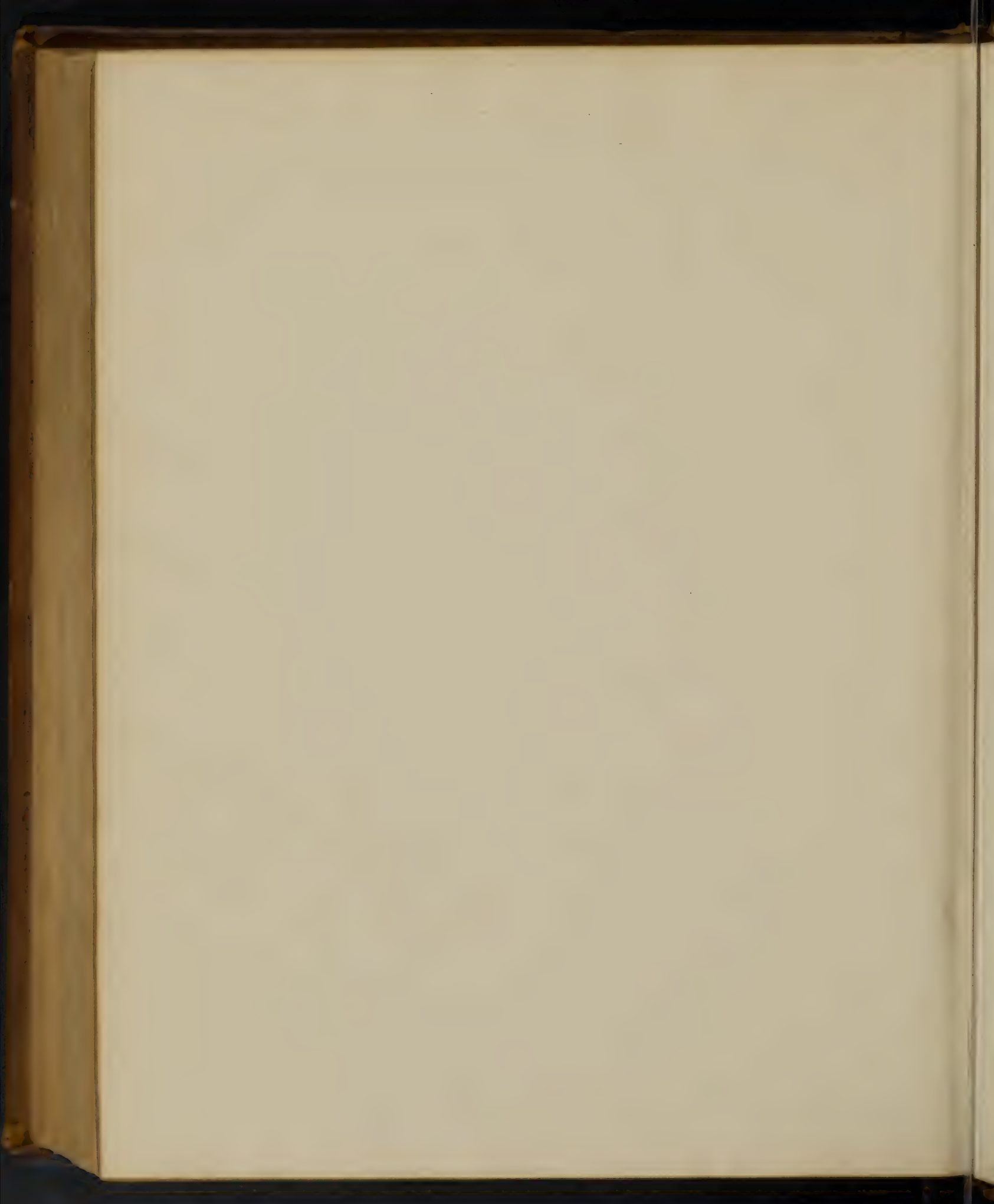


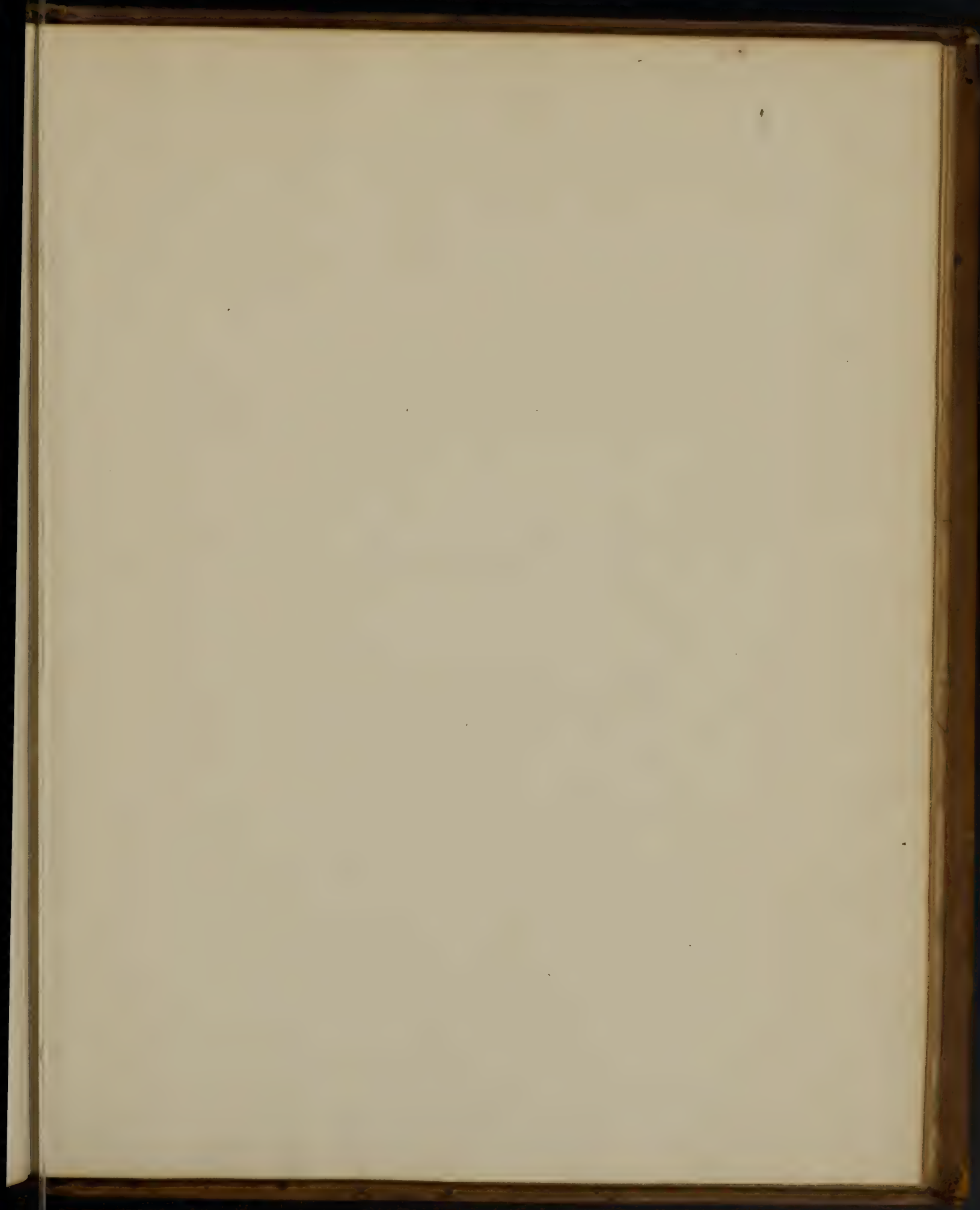


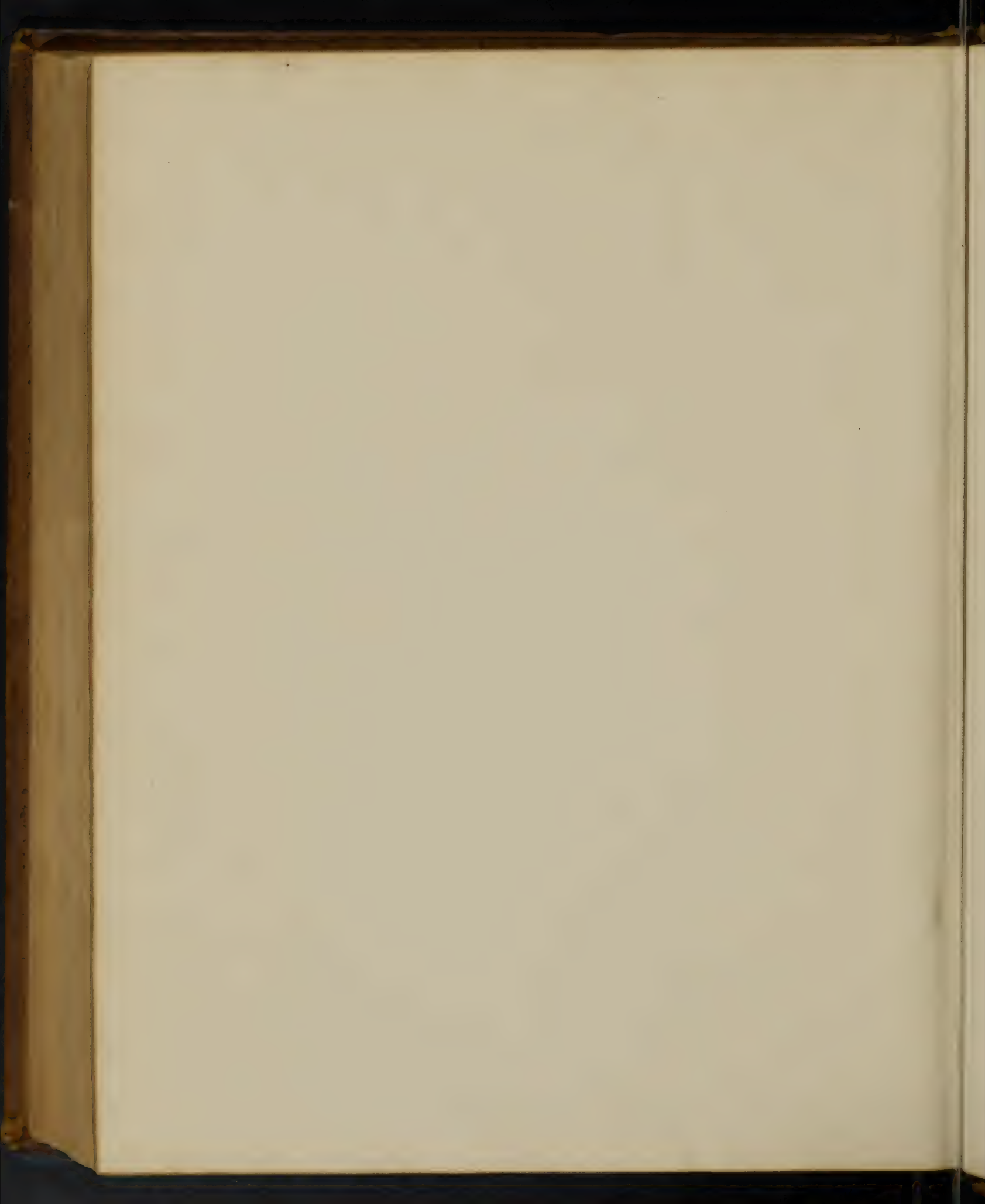


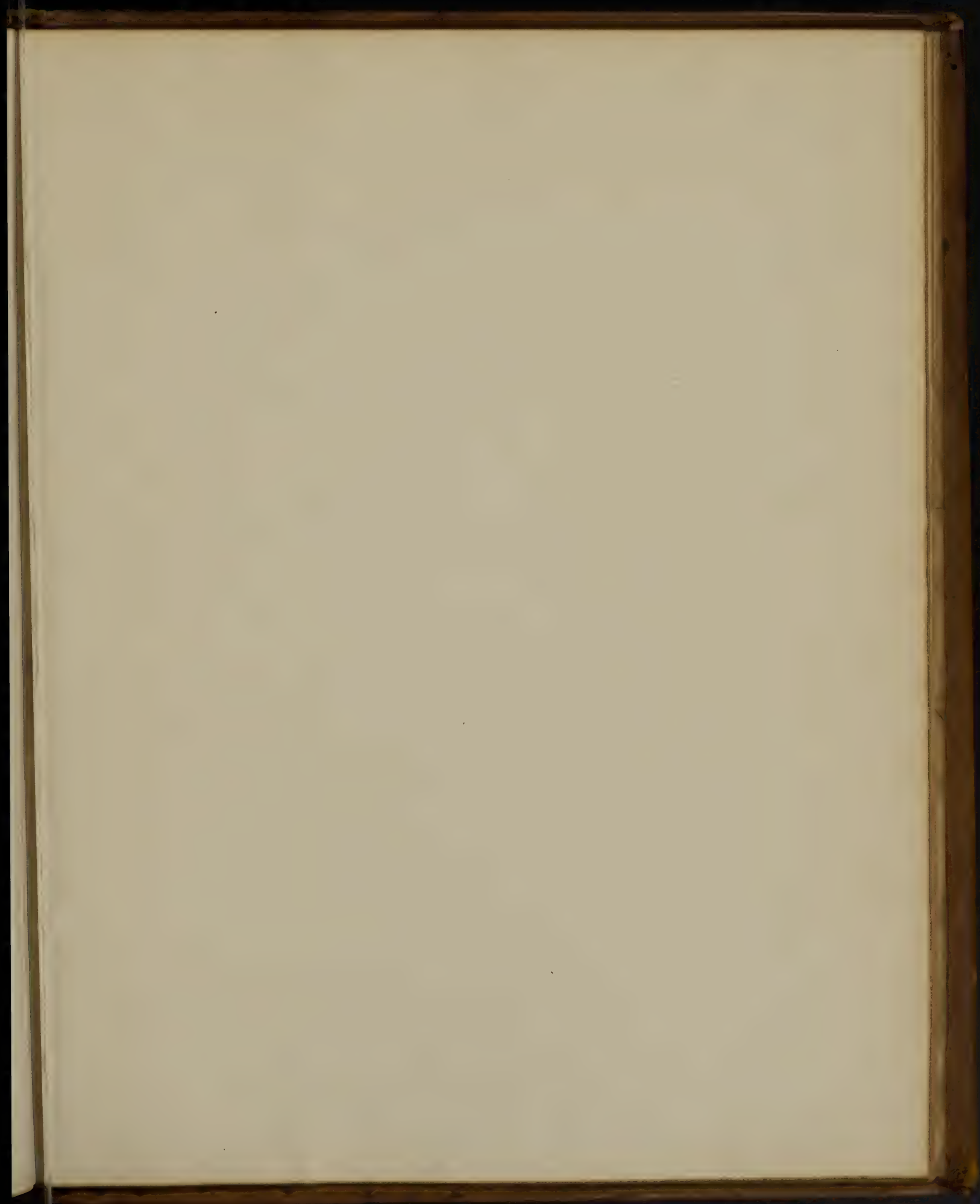


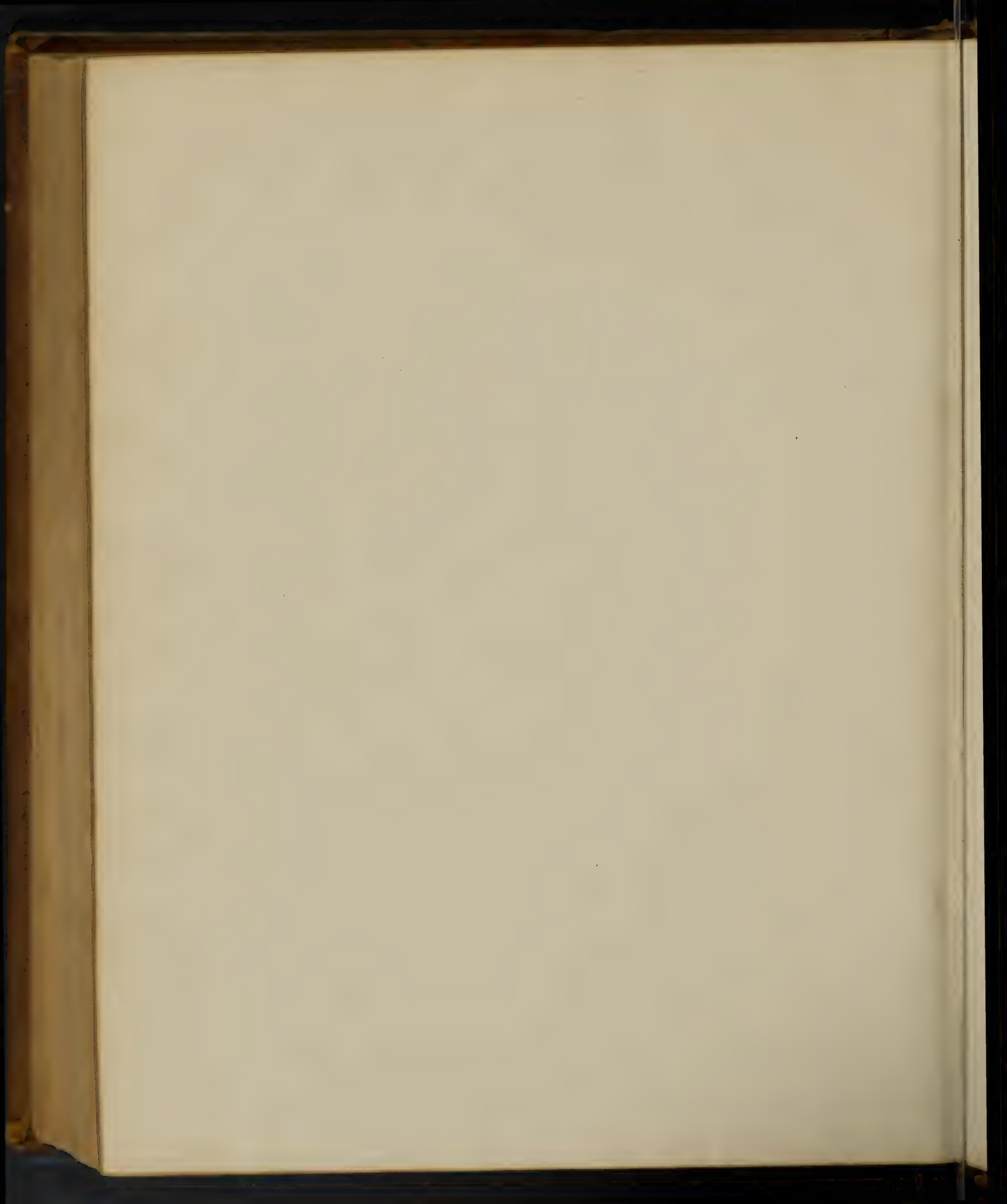


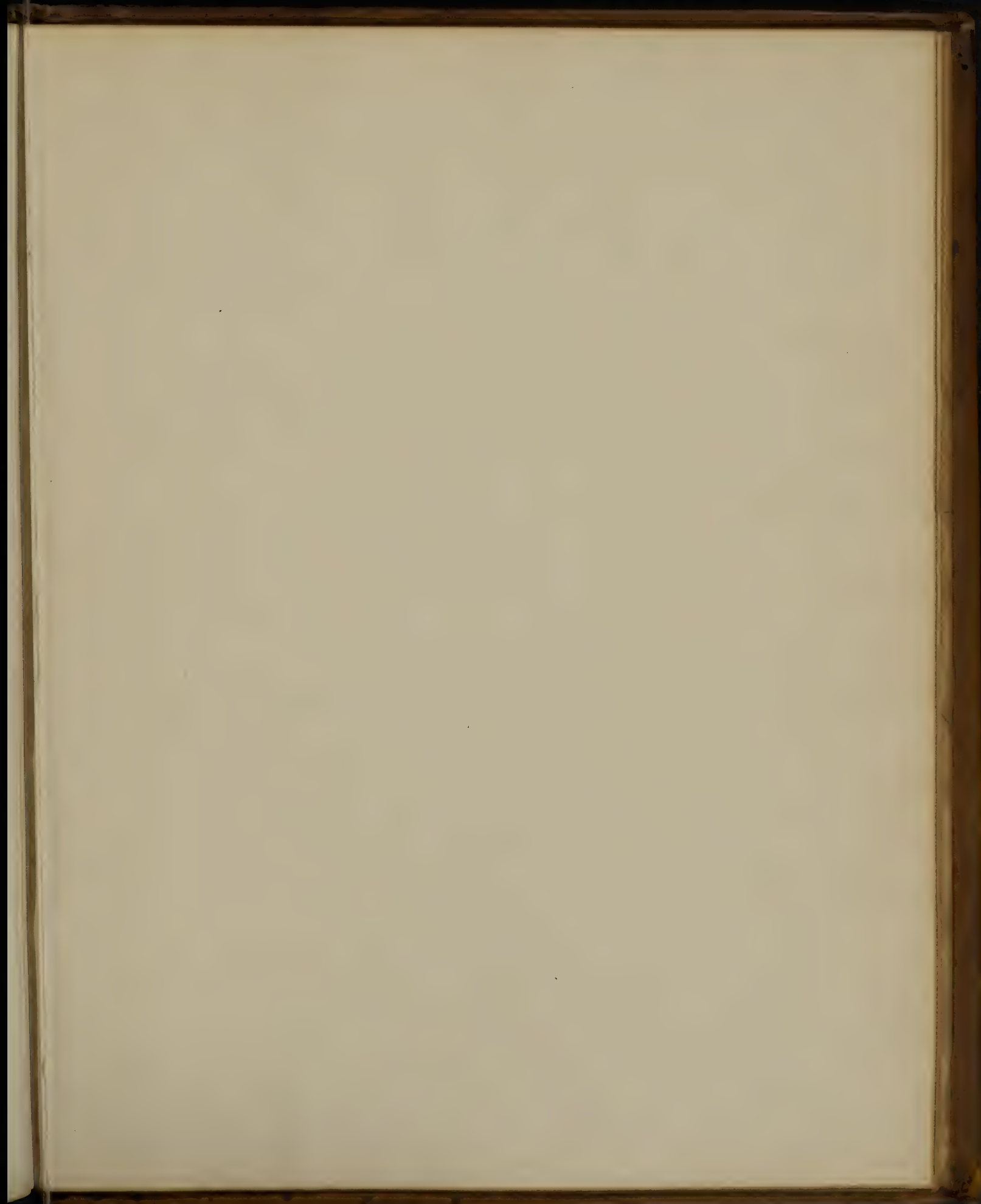


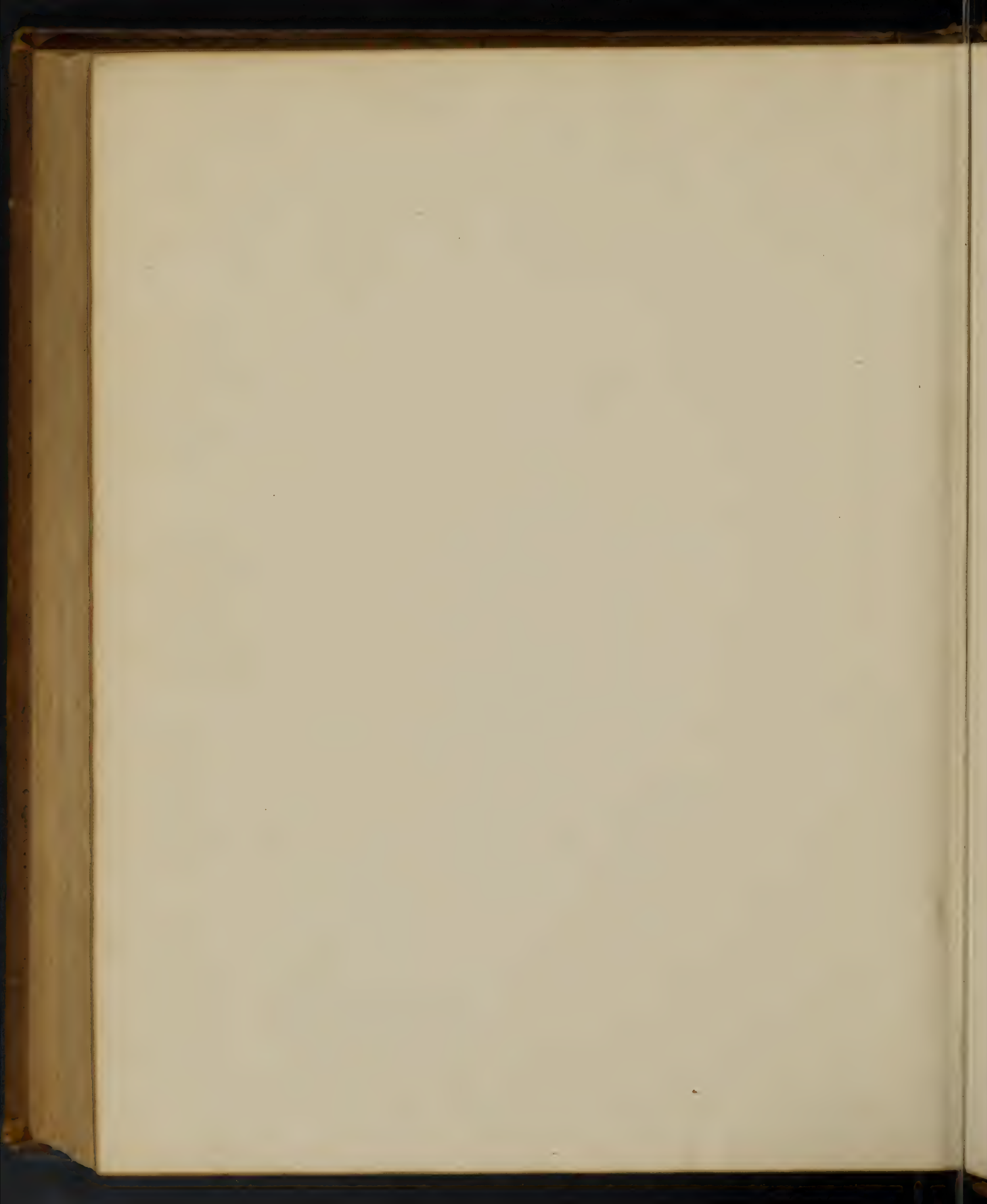


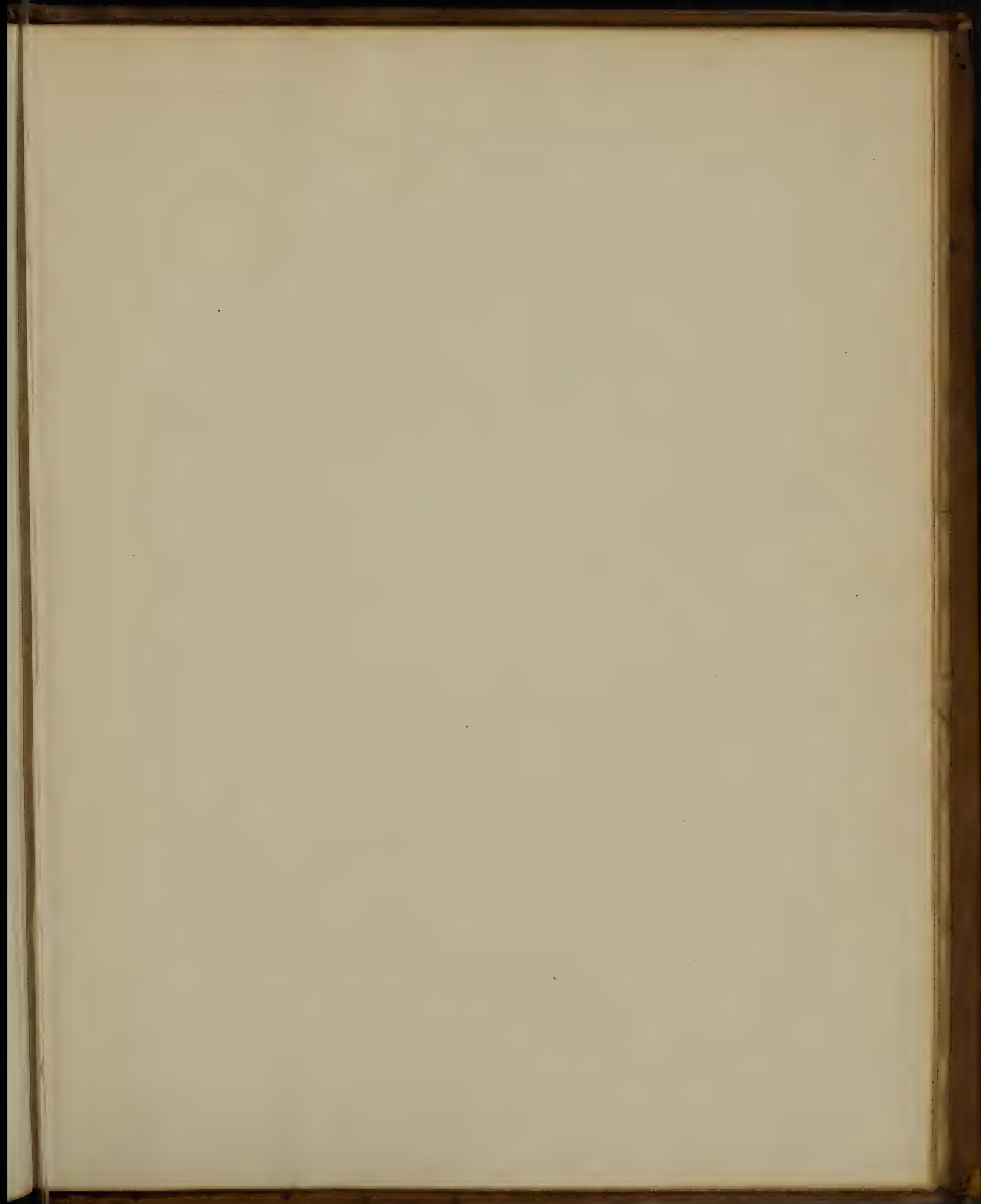


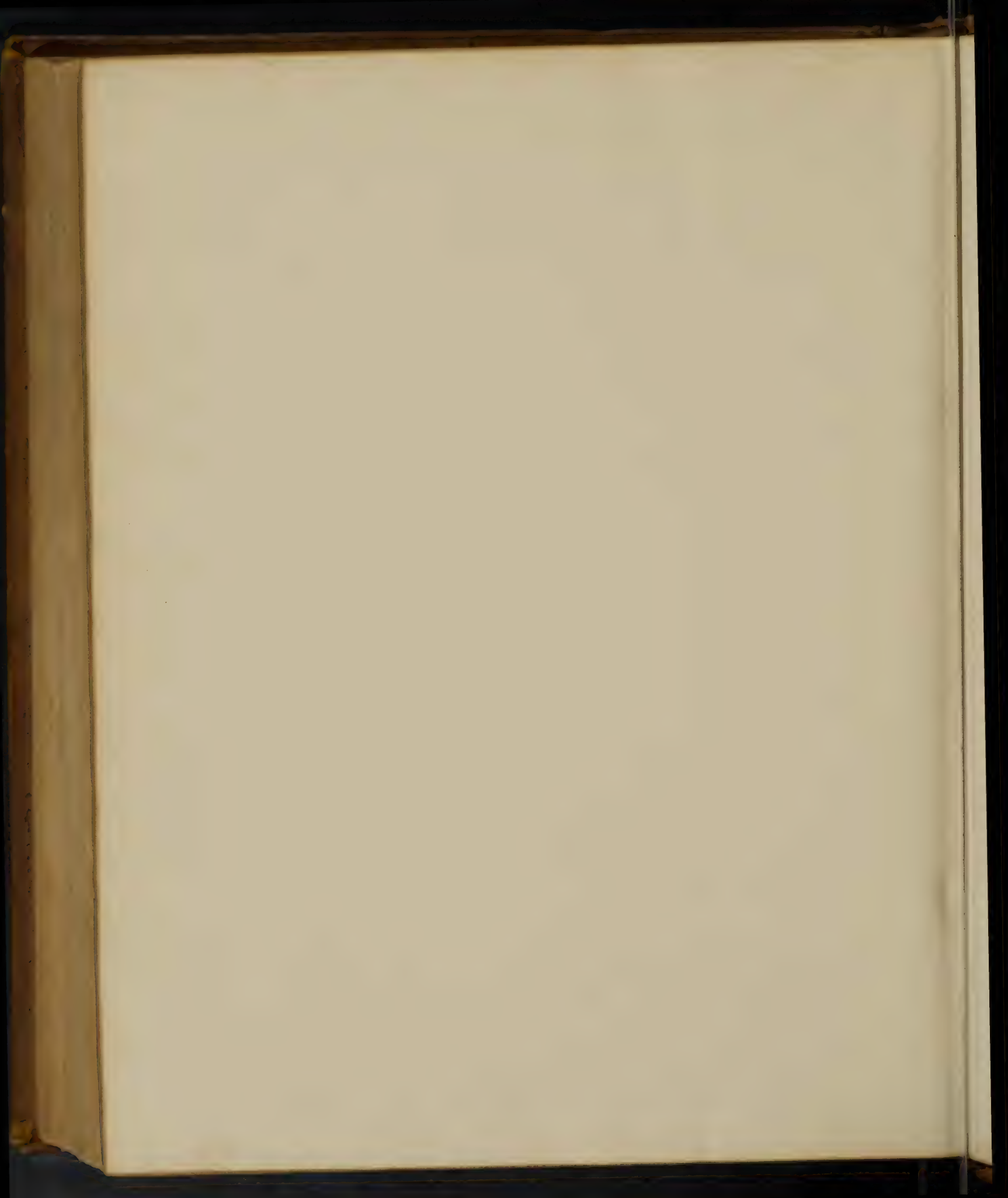


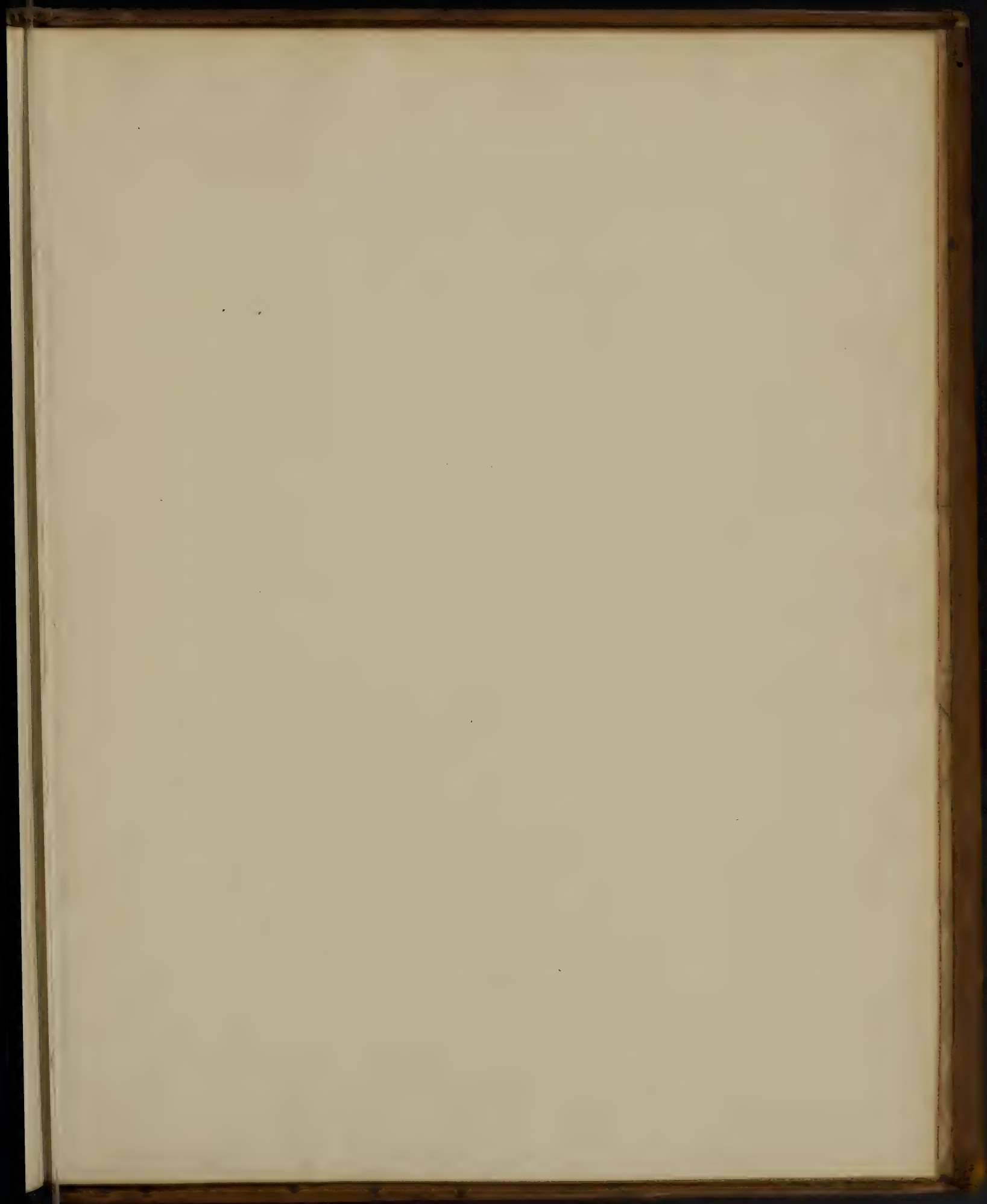


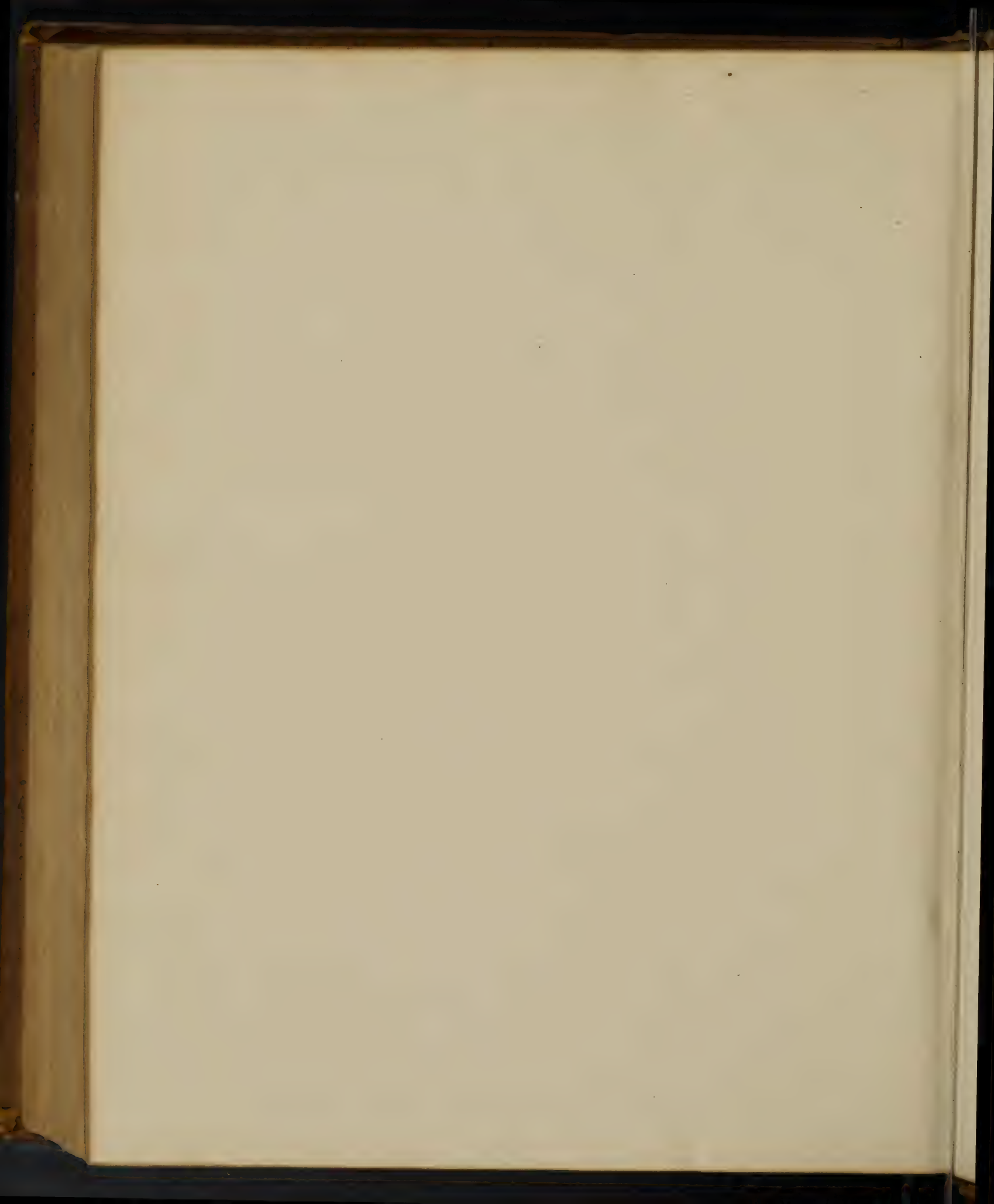


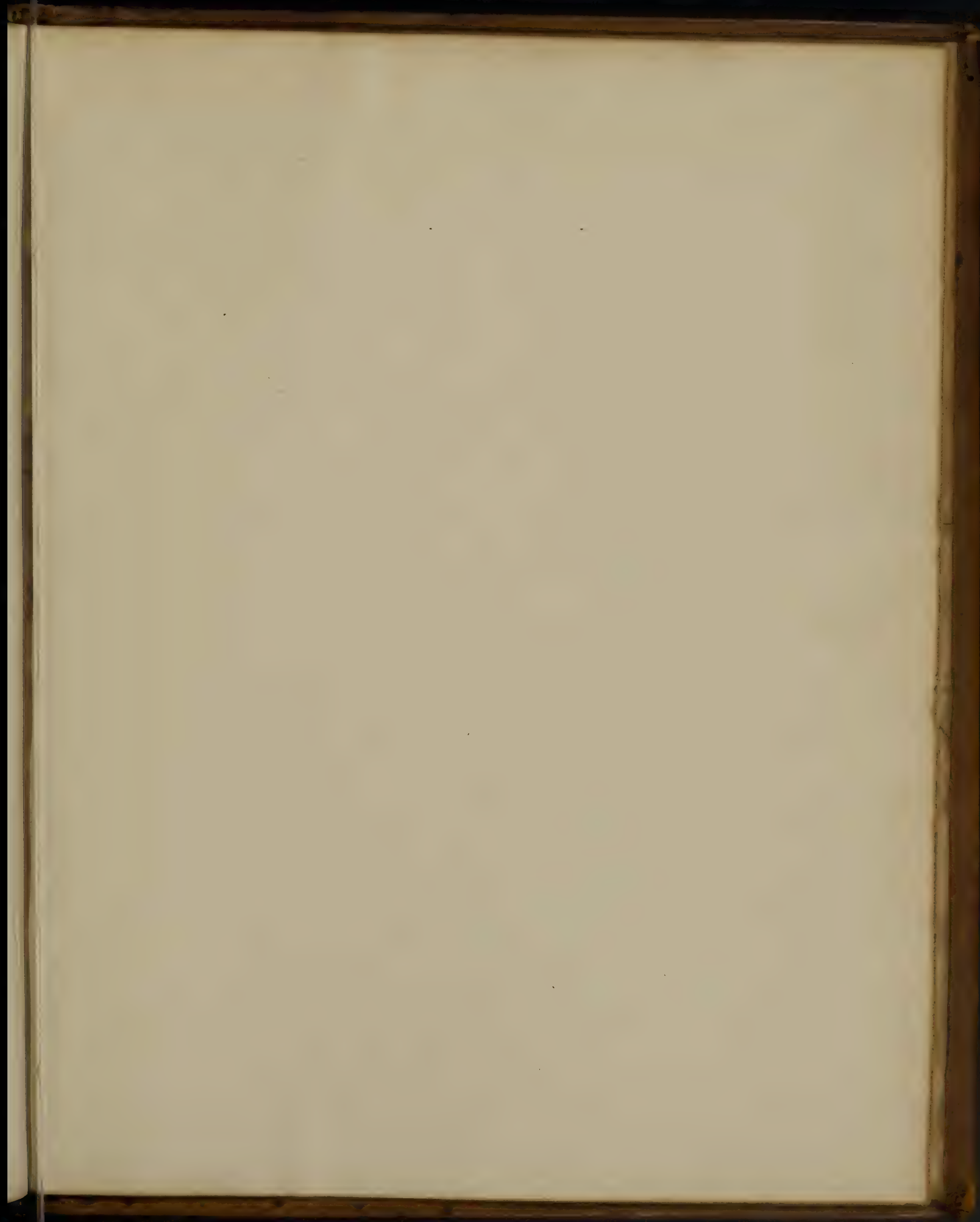


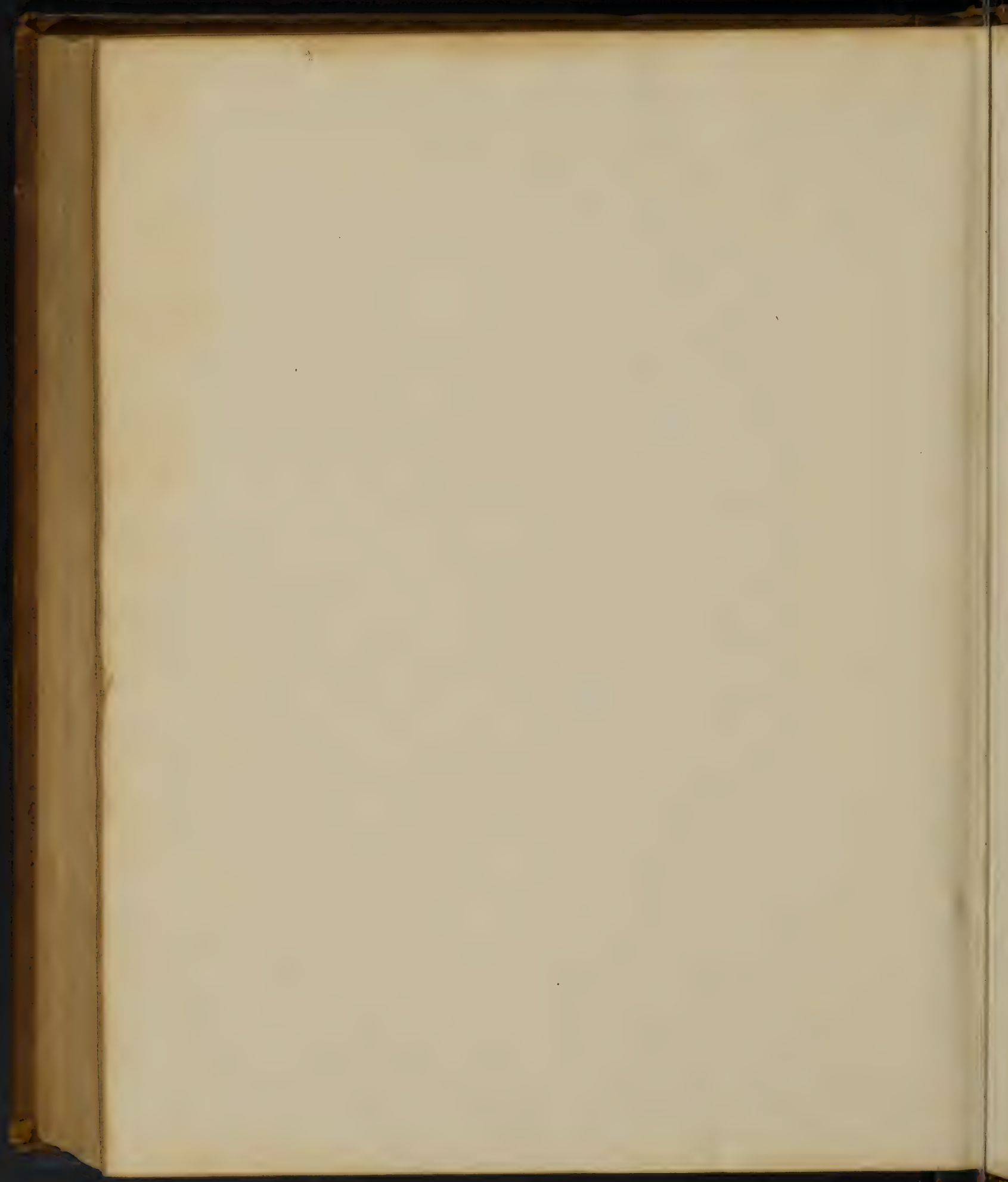


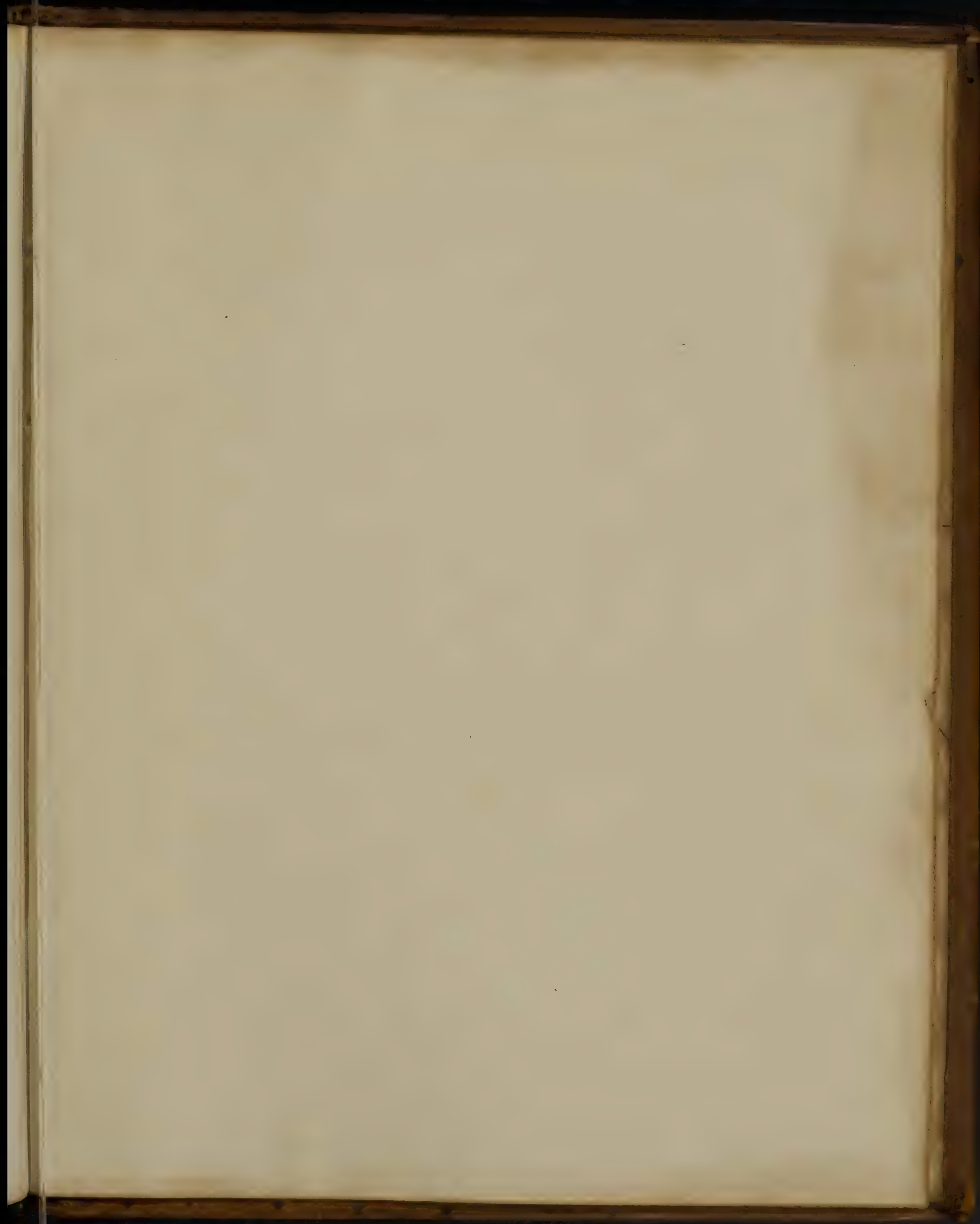


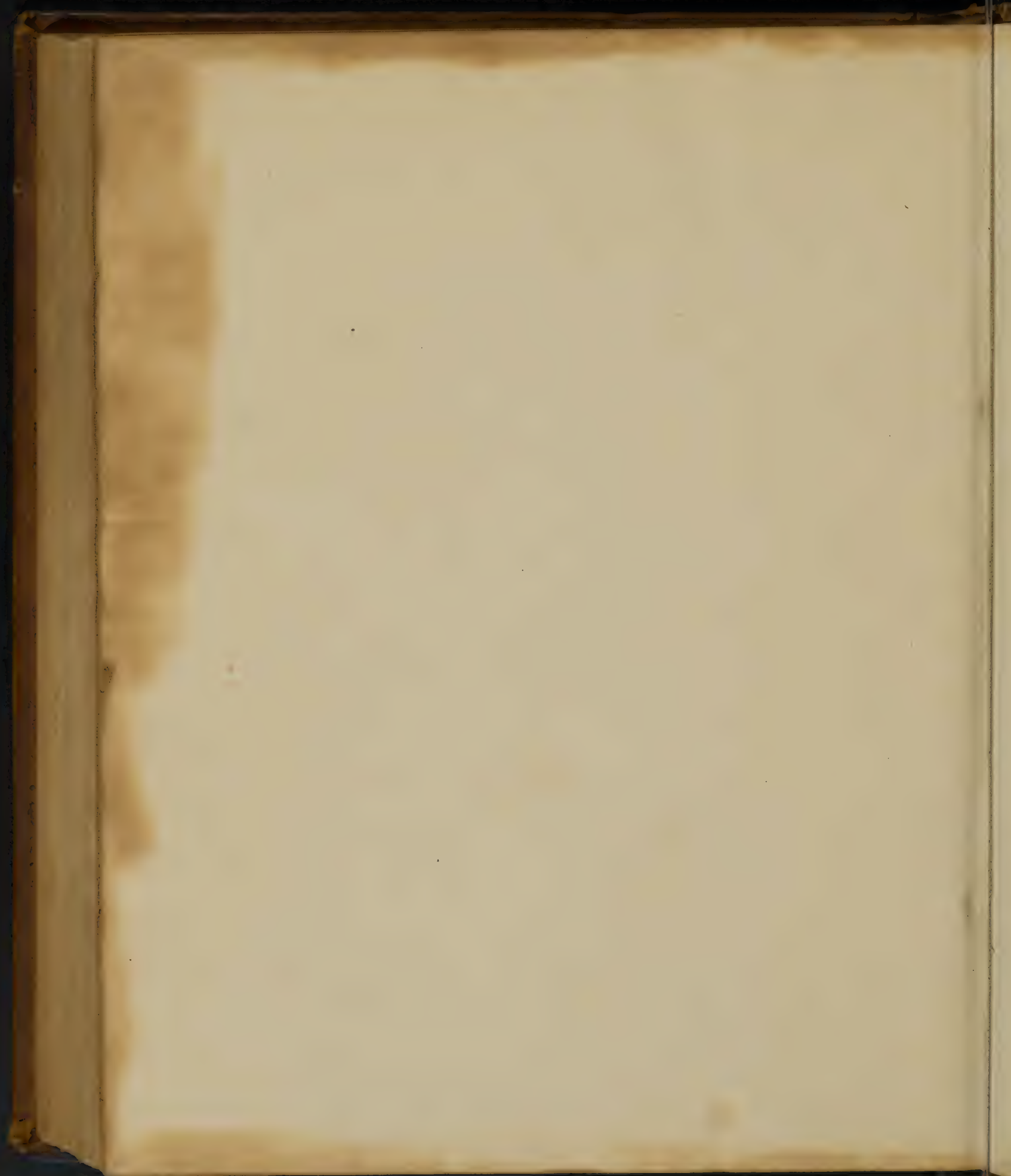


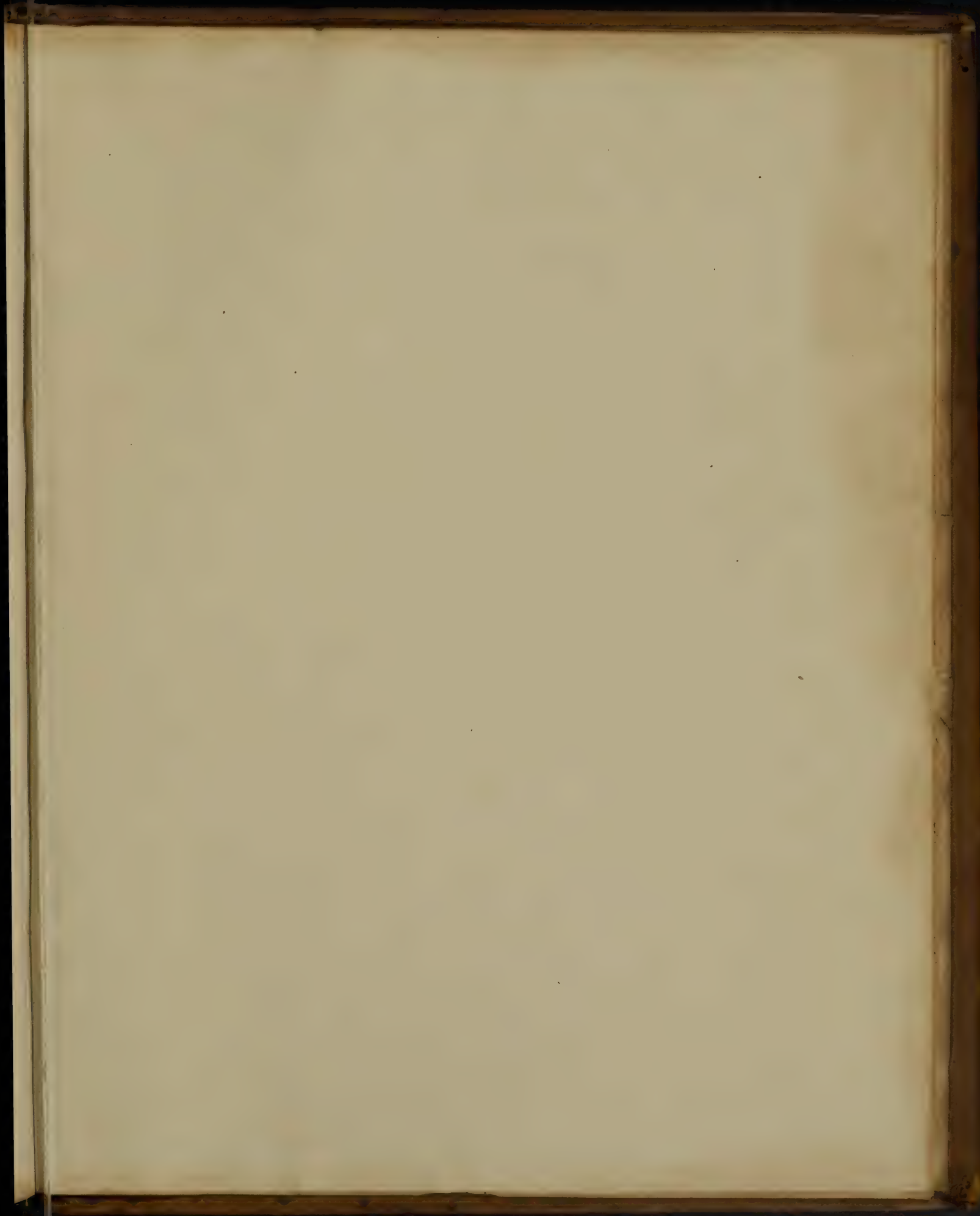


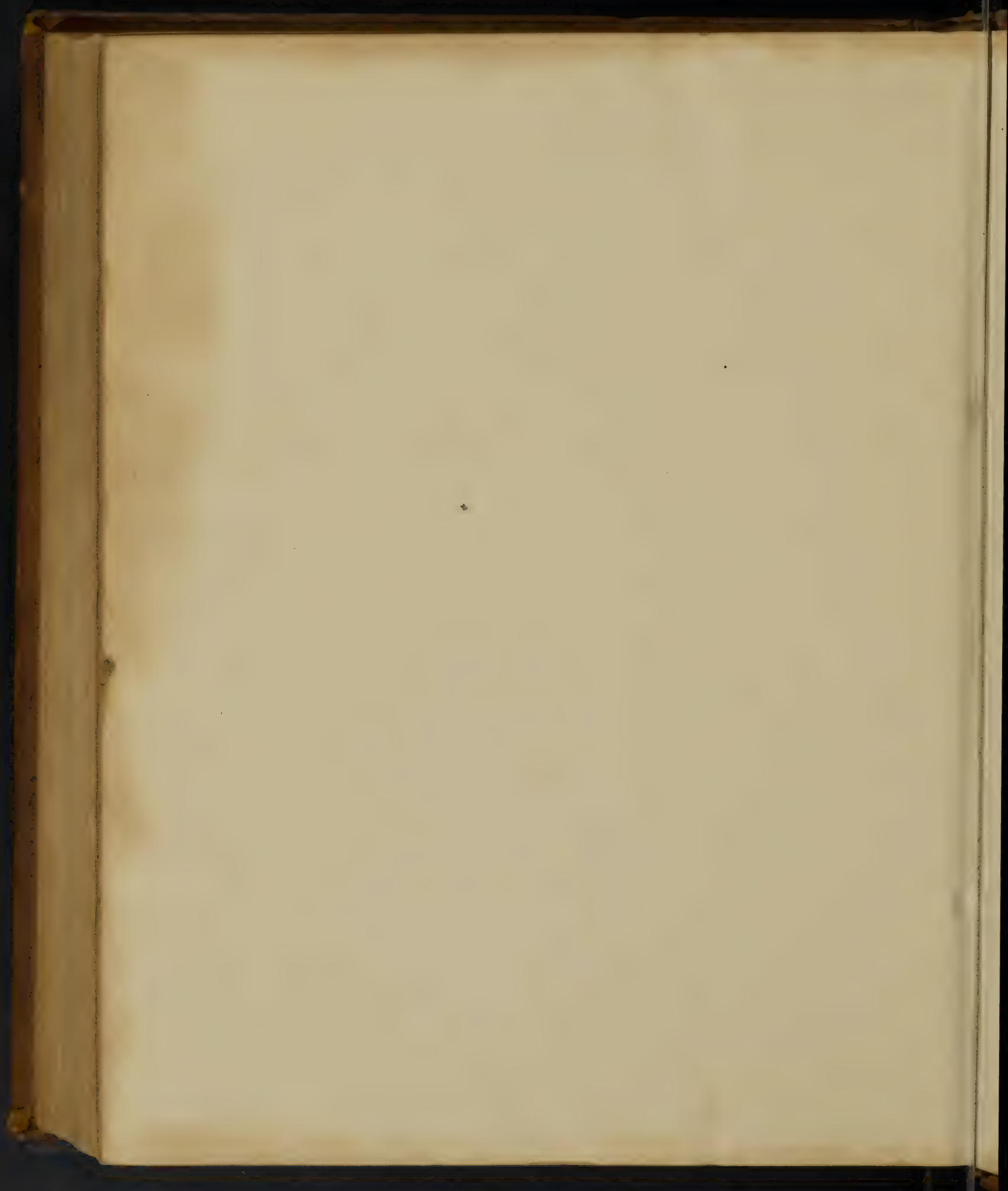


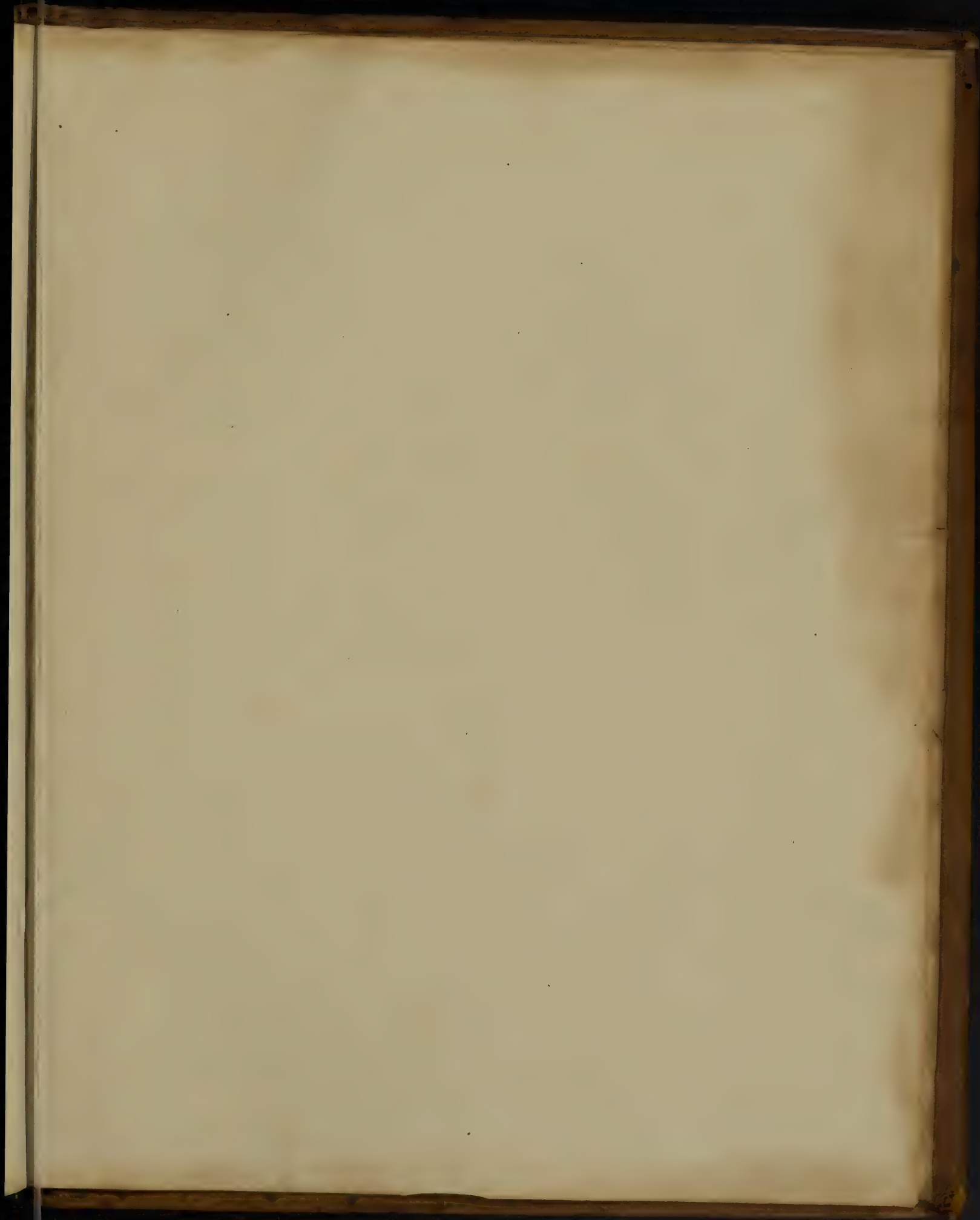


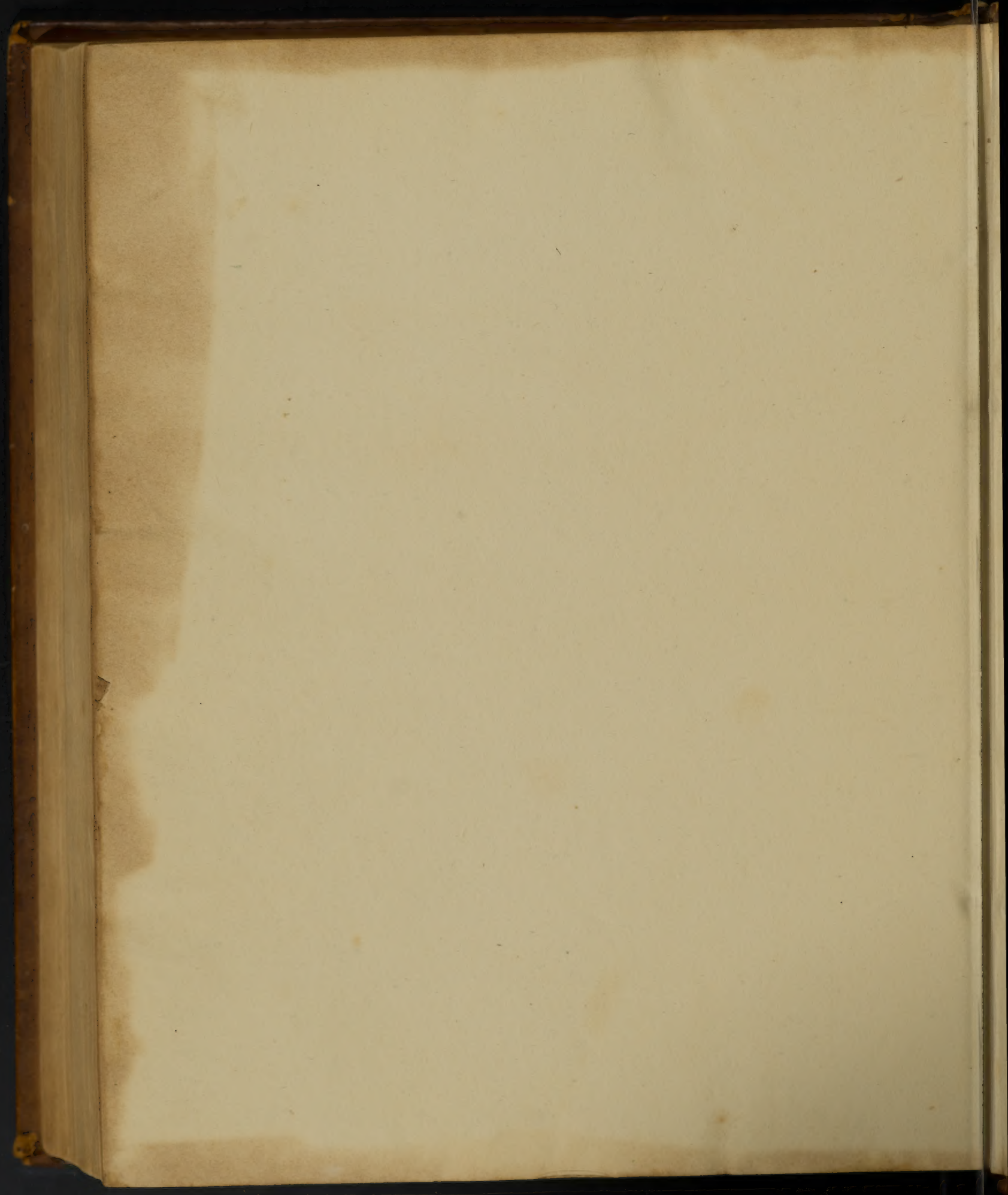




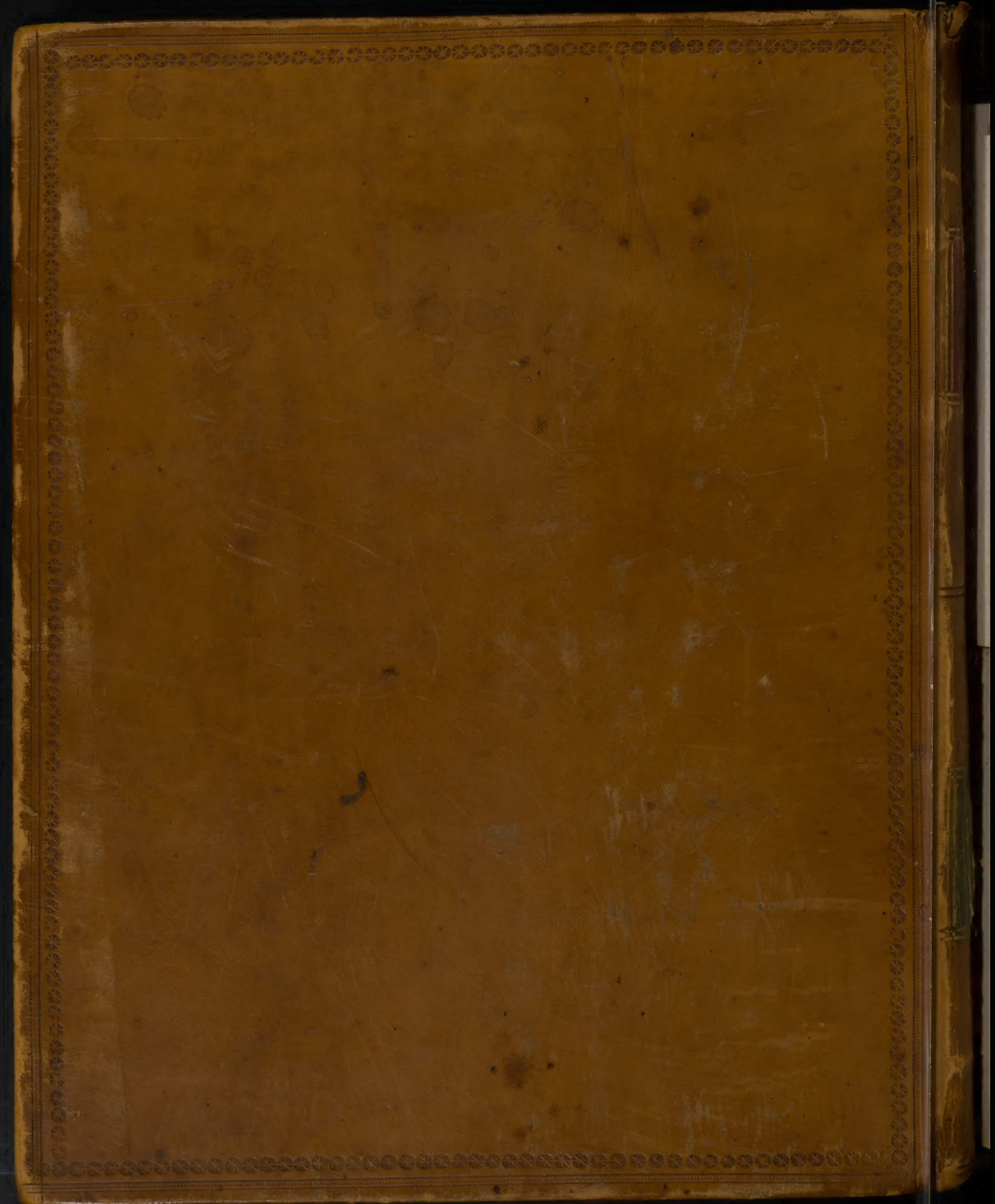








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